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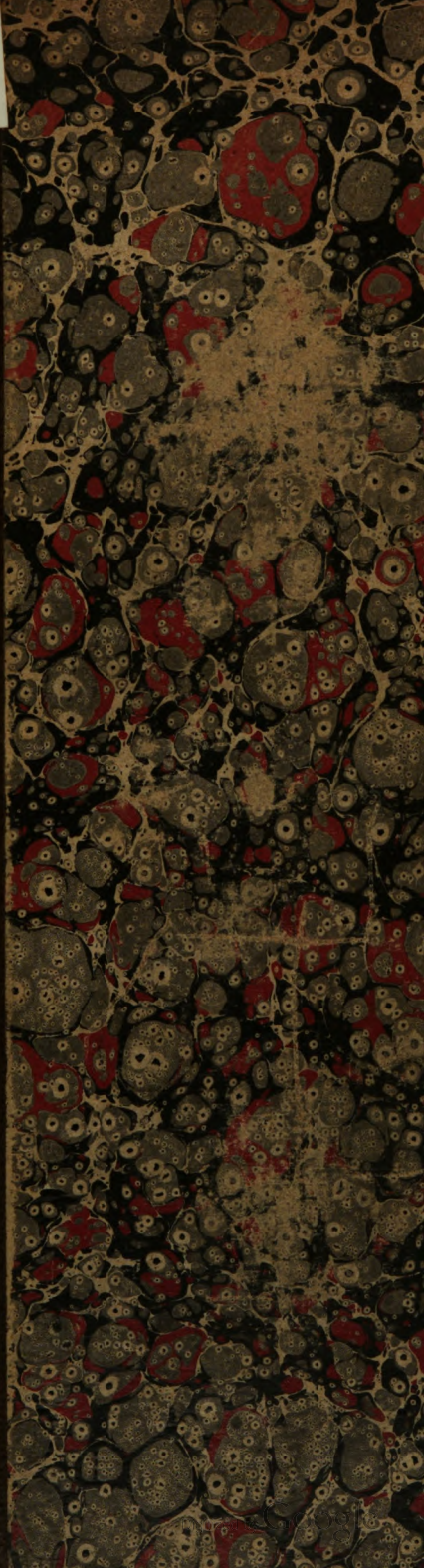
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No. XLI.

ART I.—LEGISLATION.

BY C. S. GREAVES ESQ., Q.C.

A TIME when a new Parliament has just met appears to be very appropriate for considering what is the most expedient mode by which the laws of this great Empire may be reduced into the best practicable form. We shall take it for granted that the state in which these laws at present exist is very unsatisfactory, as it seems to be admitted on all hands that such is the case.

In considering the question, we propose to review the different methods which have been suggested, and it may be well to begin with the plan which differs in the least degree from the present mode of legislation; this is the consolidation of the different enactments relating to one particular subject, which are scattered in the statute book, into a single statute.

At first sight it was very natural, even for persons familiar with our statute law, to have supposed that such a consolidation would be attended with little difficulty; but when it was attempted, under the Statute Law Commission, to carry this plan into execution, it became apparent that there

were such serious obstacles in the way as to make mere consolidation, without alteration or amendment, either impracticable altogether, or, if practicable, highly inexpedient.

The supposition that a consolidation of the statutes in their very terms is practicable proceeds upon the assumption that the terms in the consolidated statutes would bear the identical same meaning as they did in the former statutes. Now, although this might be so in many cases, it certainly would not be universally so; for there are many old Acts, the terms of which have, by the decisions of the courts obtained a special and particular meaning, so that the existing law can hardly be said to depend upon the words of the Acts alone, but is rather to be found in the Acts together with the cases upon them; and consequently, if the old Acts were repealed and re-enacted again in their very terms, whenever a case arose upon them the question might, and no doubt would be raised, whether the new enactment was to be understood in the same sense as the decisions had put upon the old enactment, and the amount of uncertainty that might be thus created would be very great. The difficulties, which might have arisen from this cause in the case of the Treason Act, 25 Edw. 3, st. 5, c. 2, were felt to be so great, that the Statute Law Commissioners, after the most mature consideration, determined that this statute could not safely be consolidated with the other criminal enactments.

Another difficulty arising from such a cause is, that a clause in one statute may, either by itself or when construed with the rest of that statute, bear one meaning, but when transferred into a consolidation Act, and separated from its former associated clauses and placed among clauses taken from other Acts, it may be open to an entirely different construction; and in this point one of the greatest difficulties of consolidation consists; for it is hardly possible, even with the greatest care, to foresee the effect of placing in the same Act, especially if it be a long one, clauses taken from different Acts. A person who draws an entirely new Act is much more likely to make

all the clauses consistent with each other, than a person who places different enactments taken from different statutes in the same Act. In the former case he must necessarily have in his mind the meaning in which he intended the terms he has used to be understood; in the latter, the question must ever be, whether he has correctly apprehended the meaning which clauses framed by others really convey.

Another very great difficulty arises from direct and implied repeals. In many instances direct repeals, which expressly refer to the clauses intended to be repealed, are so inaccurately worded, that it is next to impossible to determine how much of the clause is really repealed.

A second form of repeal is one that has crept in of late years. It is the repeal of every enactment inconsistent with the statute in which the repeal is found, without mentioning or referring to any Act at all. By this mode of repeal, doubt is thrown upon every previous clause, and it must be compared with every part of the Repealing Act, in order to ascertain whether it is repealed or not. Such repealing clauses are nearly as mischievous as implied repeals, which abound in the Statute Book, and are the most difficult of all to ascertain. These take place whenever any affirmative or negative clause is so far inconsistent with a previous enactment, that both cannot be in force at once; and it often requires a solemn decision to determine whether any, and if so, what part of an older enactment is impliedly repealed.

A single instance will well illustrate these difficulties. The Statute of Frauds, 29 C. II., c. 3, s. 1, provides that "all leases (exceeding the term of three years) not put in writing and signed by the parties, &c., shall have the force and effect of leases at will only, and shall not, either in law or equity, be deemed to have any greater force." The 8 & 9 Vict., c. 106, provides, *inter alia*, that "a lease required by law to be in writing" "shall be void at law unless made by deed." In a bill to consolidate the law of landlord and tenant, prepared by a very able and careful gentleman for the Statute Law

Commission, both these enactments were introduced, one after the other, without any remark. On examining this bill it occurred to us that the 8 & 9 Vict., c. 106, had impliedly repealed the Statute of Frauds as to all leases for more than three years having the force of leases at will, and had rendered them void unless they were made by deed; and upon the question being mooted before the Commissioners, it was unanimously agreed that the Statute of Frauds was, to some extent, repealed by the latter Act; but there was a great difference of opinion as to whether the later Act did not make such leases only void at common law, but leave them valid in equity, so that they might be enforced in a court of equity. Some of the greatest lawyers of the present day, whether on or off the Bench, differed on this question, and it was never settled. Such instances might easily be multiplied, and they show that mere consolidation is impracticable; for in such cases it must first be determined what the law is or ought to be, and then an enactment must be framed accordingly. If that be done, the bounds of mere consolidation are passed.

Only one other objection need be stated, but that is a most weighty one. Supposing all the statutes could be consolidated without alteration or amendment, what would be effected by it? The law would not be altered in any respect, and all that would ensue would be that, instead of the enactments on each particular subject being scattered over the Statute Book, they would be collected together in Acts devoted to each. No doubt this would be a considerable advantage, but this would be counterbalanced by much greater disadvantages. It would continue all enactments whether good or bad, and very possibly might revive some that are now sleeping in harmless oblivion; and it would make no improvement whatever in the existing law, but would leave every defect, however apparent, and every amendment, however desirable, for future legislation; and as it is plain that it must be followed by statutes curing such defects and making such amendments, it is obvious that any mere consolidation could only be temporary, and

must be superseded by better statutes, and the ultimate result would be that so much more useless matter would have been added to the already overgrown Statute Book.*

With these remarks we shall pass on to the consideration of the expediency of a Code.

It cannot be doubted that at the present time there is a very strong feeling—not to say prejudice—in England against a Code. We cannot help thinking, however, that this feeling is mainly, though perhaps not entirely, founded upon a great misconception of what a Code really is; and, therefore, we shall endeavour to explain what the real nature of a Code is.

A Code may well enough be described as the statement of either the whole or part of the laws of a State, which has been enacted by the legislative authority of that State. It is in reality neither more or less than a Statute or Act of Parliament. There may be any number of Codes in operation in the same State at the same time. In the United States of America a Bill is now passing through Congress to consolidate, revise, and simplify all the Statutes, applicable to the whole of the United States. In the State of New York there are, either actually in operation or in preparation, the Code of Civil Procedure, the Code of Criminal Procedure, the Political Code, the Civil Code, and the Criminal Code. And it is obvious that the legislature of any State may enact as many separate Codes as it may think fit. In truth, the number of Codes, and the subjects contained in each, are wholly dependent upon the will of the legislature.

Again, the Codes may embrace the whole, or may be confined to any part of the laws of a state. In the State of New York an endeavour has been made to provide for every case that may occur by means of their five Codes; but the very learned Commissioners who have framed these Codes have, with prudent caution, framed them so that if there be an existing rule of law

* The substance of these remarks on consolidation is to be found in the preface to Greaves' "Criminal Law Consolidation Acts."

omitted from the Codes, and not inconsistent with them, that rule will continue to exist in the same force as it now exists; while if any new rule, now for the first time introduced, should not answer the good ends for which it is intended, which can be known only from experience, it can be amended or abrogated by the same lawgiving department which made it; and if new cases arise, as they will, which have not been foreseen, they may be decided, if decided at all, precisely as they would now be decided; that is to say, by analogy to some rule in the Code, or to some rule omitted from the Code, and therefore still existing, or by the dictates of natural justice.*

It has been supposed by some that the greater part, if not the whole, of a Code, is perfectly new. Now, though the Legislature might, no doubt, in the exercise of its supreme authority, create an entirely new set of laws, yet every Code, of which we are aware, has been framed from the existing laws. The Codes of New York are framed with the greatest care from the existing laws. The Commissioners have endeavoured to collect those general rules known to our law, which are applicable to our present circumstances, and ought to be continued;† but, in obedience to the constitution under which they acted, they have introduced various alterations and amendments which they considered proper to be adopted.‡

The New York Commissioners have so fully and so ably considered the practicability and expediency of codification, that we cannot refrain from presenting their views in their own language.

"The question," they say, "whether a Code is desirable, is simply a question between written and unwritten law;§ that is to say, between law written by the lawgiver, and law not thus written; between law promulgated by that department of the Government which alone has the prerogative of making and promulgating the laws, and law not so promulgated.||

* Introduction to Civil Code, xix. † Report prefixed to Civil Code, vii.

‡ *Ibid.*, vi.

§ *Ibid.*, viii.

|| Introduction, xiv.

“ That this was ever debatable is one of the most remarkable facts in the history of jurisprudence. If the law is a thing to be obeyed, it is a thing to be known, and if it is to be known, there can be no better, not to say no other, method of making it known, than by writing and publishing it. If a written constitution is desirable, so are written laws. The same reasons which affect the one, affect also the other. There may be countries where the conflict between the different orders in a state render a definition of their relative rights a difficult, or even an impossible task, and there, of course, a written constitution is not likely to be attempted; and because a written constitution is not thought desirable, written laws are supposed to be undesirable. These reasons have no application to this country. We have no orders in the State; no classes of society clashing with each other. The will of the people is the supreme law; that will is fitly expressed by their written constitution and their written laws. It should seem, indeed, to have no other fit expression.

“ There are those who argue that an unwritten law is more favourable to liberty than a written one. The contrary should seem to be more consonant with reason. It can scarcely be thought favourable to the liberty of the citizen that he should be governed by laws of which he is ignorant, and it can as little be thought that his knowledge of the laws is promoted by their being kept from print, or from authentic statement in a written form.

“ Whatever is known to the judges or the lawyers can be written, and whatever has been written in the treatises of lawyers, or the opinions of judges can be written in a systematic code.

“ It is no answer to say that nothing can be written, which will not be susceptible of different interpretations. That may be true. But, it is no more susceptible of different interpretations when written in a Code than when written in the Reports. On the contrary, when expressed with care, for the very purpose of stating a rule, which is to govern all cases alike, there

is more likelihood of precision in language than when expressed with reference to a particular case.*

“Whether a general Code of the law should be possible, should seem from the nature of the subject hardly to be doubtful. The common law of New York, like the common law of England, from which it is in great part derived, consists of a vast number of rules of property and of conduct, which have been applied by the judicial tribunals, and which had their origin either in legislative enactments, now forgotten, or in traditions from ancient times, or in the consciences of the judges, as the cases came before them. The decisions of the tribunals have been for ages preserved in writing. If there was ever a time when they were held in memory alone, that time has long passed. All that we now know of the law, we know from written records. To make a Code of the known law is, therefore, but to make a complete analytical and authoritative compilation from those records. The records of the common law are in the reports of the decisions of the tribunals; the records of the statute law are in the volumes of legislative acts. That these records are susceptible of collation, analysis, and arrangement, might have been assumed beforehand, even if we had no proof in our libraries, in digest upon digest, more or less perfect, to which we daily resort for convenience and instruction. The more perfect a digest becomes, the more nearly it approaches the Code contemplated by the Constitution. In other words, a complete digest of our existing law, common and statute, dissected and analysed, avoiding repetitions, and rejecting contradictions, moulded into distinct propositions and arranged in scientific order, with proper amendments, and in this form sanctioned by the Legislature, is the Code which the organic law commanded to be made for the people of this State. That this was possible was all but proven by what had been already done among ourselves.

“It was fully proven by what had been done in respect to

* Report, vii. viii.

the law of other countries. The law of Rome, in the time of Justinian was, to say the least, as difficult of reduction into a Code as is our own at the present day. Yet it was thus reduced, though, no doubt, to the disgust and dismay of many a lawyer of that period. The concurrent judgment of thirteen centuries since, has, however, pronounced the Code of Justinian one of the noblest benefactions to the human race, as it was one of the greatest achievements of human genius.

“France, at the beginning of her revolution, was governed partly by Roman and partly by customary law. The French Codes made one uniform system for the whole country, supplanting the former laws, and forming a model, by which half of Europe has since fashioned its Legislation. It should seem therefore, to be quite beyond dispute that a general Code of law is possible.

“Whether it is also expedient is a different question. One of the objections made is, that it is not possible to provide for all future cases. You may, it is said, stretch your foresight to its utmost limit; you may exhaust all the sagacity and ingenuity of the human mind, the future, nevertheless, is a sealed book; you cannot look into its unopened leaves, and, therefore, attempting to provide for what they contain is spending your strength in a vain and fruitless effort. This does not appear to be an objection of any weight whatever; because we cannot provide for all cases should be thought a poor reason for not providing for as many as possible. To render the existing law as accessible and as intelligible as we can, is a rational object; though we cannot foresee what ought to be the rule of law in cases yet unknown. To cast aside known rules which are obsolete, to correct those which are burdensome or unsuitable to present circumstances, to reject anomalies or ill-considered cases, to bring the different branches into a more perfect order and agreement, may be of immense value, though we cannot look beyond the present to make provision for what has never yet appeared.

“ The objection, however, assumes more than should be granted without qualification. There are certain departments of the law, of which we may affirm, with perfect confidence, either that we have provided for every possible case, or that when a new case arises, it is better that it should be provided for by new legislation than by judicial decision. Thus, in respect to the Penal Code, it may be affirmed that every act for which punishment may be inflicted ought to be designated beforehand; that no man ought to be punished for an act not so designated; and that if any act should be committed for which society has prescribed no punishment, it may go for once unpunished, and a new law be made against other like acts in future. As to the Political Code, it must, by its very nature, cover the whole subject. And for the Code of Civil Procedure, it is enough to say, that when the first Report was before the Legislature, some of the members were troubled with similar fears about the want of provision for future cases, and, to satisfy them, this provision was introduced:—“ If a case shall arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this Act, the practice heretofore in use may be adopted, so far as may be necessary to prevent a failure of justice ;” but no such case has ever yet arisen.

“ If a case unprovided for could not arise under the Code of Civil Procedure, much less could it arise under the Code of Criminal Procedure. It may, therefore, safely be affirmed that there is but one of the five Codes—that is to say, the Civil Code—to which, with any semblance of justice, it may be made an objection that it cannot provide for all future cases. This Code is undoubtedly, the most important and difficult of all; and of this it is true, that it cannot provide for all possible cases which the future may disclose. It does not profess to provide for them. All that it professes is to give the general rules upon the subjects to which it relates, which are now known and recognised, so far as they ought to be retained, with such amendments as seemed best to be made,

and saving always such of the rules as may have been overlooked. In cases where the law is not declared by the Code, it is to be hoped that analogies may, nevertheless, be discovered which will enable the courts to decide. If in any such case an analogy cannot be found, nor any rule which has been overlooked and omitted, then the courts will have either to decide, as at present, without reference to any settled rule of law, or to leave the case undecided, as was done by Lord Mansfield, in *King v. Hay*, 1 W. Bl., 640, trusting to future legislation for future cases.

“ Another objection to the expediency of a Code is its supposed uncertainty. The argument is this, in the attempt to be systematic and concise, you must of necessity leave the language open to different interpretations. Now it is quite true that as a word has often different meanings, and a change in the structure of a sentence may suggest different ideas, it is difficult to frame a section that may not be tortured into a meaning unlike that which its framers attached to it. But it is a great mistake to consider this true only of the concise propositions of a Code; diffuseness is not a help to clearness. The longest judicial opinions are generally the least precise, and the least comprehended. As a long document is usually more obscure than a short one; as a statute of many sections is commonly less understood than one of a few; as many words tend to confusion rather than enlightenment; so a single proposition, carefully expressed and made as concise as possible, is more likely to be precise and susceptible of one meaning only, than if the same idea were put into a different form and a greater number of words.

“ If it be urged that reported decisions have this advantage, that, being made in each case with reference to a given state of facts, those facts are illustrations of the rule announced, and tend to explain it, the answer is that the facts of a case reported serve for limitation as well as illustration, and just in that proportion the rule announced is partial and not general, and if acted upon as general tends to mislead; so that after

all we are brought to the same point, which is that the rule of the decision, whatever it may be, partial or general, can be more precisely and accurately stated in a few short sentences than in the opinion, more or less diffuse, in which it is stated, or from which it may be evolved.

“So far as reported cases serve for illustration, the present Code makes use of them; for the references to adjudged cases, which in most instances follow the sections, are intended as much to answer the purpose of illustration as to justify the text. It is a favourite idea with many that, for promoting certainty, the propositions of a Code should be accompanied by illustrative examples. Whatever advantage there may be in this method, these references, it is supposed, will furnish the best kind of illustration.

“A still farther objection to the expediency of a Code is its supposed inflexibility. Expressed in formal propositions, and couched in positive terms, it is not as flexible, say the objectors, as the common law. This is the objection most insisted upon by those who oppose a Code, and it should, therefore, receive the most careful consideration. It may be first observed that flexibility, in its ordinary sense, is one of the worst qualities which a law can have, or rather that it is inconsistent with the idea of law. As the law is a rule of property and of conduct, it should be fixed. If it be meant that a rule, made for a certain state of facts, may not be applicable to a different state of facts, that will not be disputed; if it be meant that such a rule ought not to be applied to the same state of facts under all circumstances, the objection amounts only to this, that the rule is too broadly stated; if it be meant that a rule ought to be subject to the discretion of the judges, the proposition is unsound; for the judges should not have dispensing power.

“Another way of stating the objection, is to say that while the common law is expansive, a Code does not expand or adapt itself to the expanding exigencies of society. A different phrase for the same idea is that common law is elastic

and accommodating, and that a Code will be the opposite. Now, to say that a law is expansive, elastic, or accommodating, is as much as to say that it is no law at all. The real significance of the objection, if it has any significance, is that it is better to let the judges make the law as they go along than to let the lawgiver make it beforehand. For if the judges are to decide according to known rules, these rules can be written by the lawgiver as easily as they can be spoken by the bench, or taken down by the reporters. And even though, in particular cases, the judges should fail to find such rules, and should have to make rules as the cases occur, that, too, can be done as easily when the known rules are placed in a Code, as when they repose in the breasts of the judges or in the leaves of reports. So long as a Code is confined to the rules of law as they now exist, it is neither more nor less expansive than the common law. When the inquiry concerns new cases it is divisible into two parts, one relating to those cases which are foreseen, and the other to cases which are not foreseen. Those which are foreseen the lawgiver can provide for, and it is his duty to provide for them. Those which are not foreseen cannot be provided for, except by directing the courts to decide according to the analogy of existing rules, when there is such analogy, and when there is none, then to decide according to the dictates of natural justice.

“In this last respect the judges will be in the same predicament under a Code as under the common law ; so that really the only point of difference respects those new cases which can be foreseen or reasonably anticipated, and if there be persons who think that for such cases it is better that the judges should make the law, after the cases arise, than for the Legislature to make it as a guide beforehand, then they think that Government ought not to be divided, according to the fundamental American maxim, into three separate legislative, executive, and judicial departments.

“If we look, for example, at any of the leading cases reported we see the facts given, the conclusion of the judges, and the

reasoning by which that conclusion was reached. Whatever legal proposition is necessarily involved in this conclusion is to be deemed an established rule of law. This rule may be written in a Code, or it may be left in the Reports. Is it any more flexible in the one form than in the other? Certainly not, unless the judges feel themselves at liberty to depart from it, so long as it remains in the Reports alone. But that would be to declare that the decision is not law:

“It is possible that the idea of flexibility in one form, and inflexibility in the other, has arisen from not sufficiently attending to the distinction between general and partial rules. It may be perfectly safe to lay down a certain general rule, but not at all safe to undertake the enumeration of all the particulars to which the rule may be applied. A Code which should attempt to do the latter would fail, not because it would be inflexible, but because it would be defective. Take, for example, the rule that implies a promise to pay over money which the party ought not to retain, as announced by Lord Mansfield, in *Moses v. McFarlane*, 2 Burr. 1,005, in this language:—“In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund the money.*” This, as a general rule, could be introduced into a Code with perfect safety, while it would be certain and inflexible. But if there should be an effort to go into details, and to enumerate all the particular cases, to which the rule has been or could be applied, the enumeration would be defective, inasmuch as it would be impossible for human foresight to discern all the occurrences to which it might be applicable. It might be possible to collect and enumerate all the instances in which the rule has been applied, and to state the circumstances; it might also be possible to mention many cases likely to arise in the future, to which it would also be applicable; but it would never be safe to pronounce absolutely that it should only be applied to the cases enumerated, for the obvious reason that others may occur, just as urgent, which human foresight has

failed to discover. The objection to a Code which should attempt this would be, not that the rules given were inflexible, or that the Code itself was inflexible, in any other sense than that it attempted too much, and was fashioned on a false principle.*

“ Even in the case supposed, a Code and the common law would stand on the same footing, unless something was put into the former which was not in the latter ; for neither in one form or the other are either the general or the particular rules flexible ; the general rule is comprehensive, the particular rules are not comprehensive ; the latter would be of little value except as pointing to the former, and if that act is once given, it covers as many cases when inserted in a Code as when left in the common law at large.

“ There is, for instance, a rule of the common law, that a contract is void which is against public policy. What is or is not against it is left for the courts to decide, since the policy changes from generation to generation, and almost from year to year. The judges are not thereby invested with power to change the law, but to apply established law to the circumstances of each case as it arises, and is then compared with the policy of the State for the time being, or with the general policy of nations. The power to decide the question of compatibility in such a case, between the act and the policy, is not a legislative, but a judicial power, as much as to decide whether a by-law of a corporation is or is not reasonable, or whether, in considering the effect of an act performed, the time of performance was reasonable or unreasonable. It may, indeed, be affirmed that certain acts are against public policy, and so far the present Code has attempted to go, but it has not attempted, and could not safely attempt, to define all the acts

* The soundness of this reasoning is well illustrated by [the numerous vain attempts which were from time to time made by Statutes in England to specify every attempt to murder, and every malicious injury by arson or otherwise. These defects are now cured by the general clauses including all attempts to murder, the burning buildings of all kinds, and malicious injuries of every description, which are inserted in the Criminal Law Consolidation Acts.

by which men might hereafter seek to countervail that policy, or to foresee what the policy itself should be in ages to come.

"If by flexibility be meant susceptibility of progression, then it may be affirmed with confidence that a Code, upon the theory on which this is framed, not only adapts itself to the present wants of society better than the existing common law, but that it contains within itself, in a greater degree, the elements of future progress; not because its rules are any more or less flexible than those of the common law, but for the reasons which will now be stated.

"The first of these reasons is that while the judicial department has been unable, or, if able, unwilling to make necessary amendments of the law, the legislative department, to which the power of amendment of right belongs, has been embarrassed, first, by the disjointed and comparatively inaccessible form in which the great body of the law has lain; and, secondly, by that maxim of the common law, by which the judges were taught that every statute in derogation of it was to be strictly construed. The first cause of embarrassment is removed so soon as the Legislature and the people have before them the whole body of the laws in an accessible and compact form, by which the relation of the several parts to each other and to the whole can be better seen, a defect in any part sooner discovered, and the particular amendment indicated which ought to be made. The second cause is removed by the declaration that the maxim of strict construction has no application to a general Code.

"Nothing is more conspicuous in the history of jurisprudence than the tenacity with which the judges of America and England, unlike those of continental Europe, have adhered to precedents, even though the reason for them has ceased, and their mischiefs have become palpable.

"Take for example the practice of the courts as it existed before the Code of Civil Procedure. If any part of the common law should have been flexible, that should have been; for it was made almost entirely by the judges. And yet, both

here and in England, while they expressed their regret at the state of things, they were compelled to declare that the evils of the system were too deeply rooted to be removed by any power short of the legislative. Whenever the Legislature did interfere, the courts refused to go beyond the strict letter of the statute.

“No fact of early English history is more certain than that the existence of equity, as a separate system, was owing to the rigid adherence of the common law judges to form; in other words, to the iron inflexibility of the law. Equity itself soon fell into the same predicament. It would not, at any time, have been thought proper or safe for the courts to disregard an established precedent at law or in equity, upon the idea that the circumstances of the community had so changed as to make the precedent oppressive. Decisions have been frequently overruled, it is true; but upon some such excuse as that they were made by a divided court, or by an inferior one, or with reference to particular circumstances, or without sufficient consideration.

“In almost every instance where an improvement has been made in the laws, it has come from the Legislature. Had society been left to the discipline of the common law, whether it be called flexible or inflexible, the most cruel and bloody of criminal systems would still have shamed us; feudal tenures, with all their burdensome incidents, would have still remained; land would have been inalienable without livery of seizin; and wives would have had only the rights which a barbarous age conceded to them.

“Even in the matter of contracts, that portion of the common law where the attribute of flexibility would have been, if ever, desirable, what do we still see? While it cannot be denied that in nine instances out of ten tenants hire houses in the belief that landlords must repair them, if necessary; that tenants, who agree to repair, have no suspicion that if the house is burnt they are bound to rebuild; that when a creditor accepts part payment in full satisfaction, the bargain is sup-

posed to be binding; that an instrument under seal, signed by an agent in his own name, but expressly declaring that he signs for his principal, is considered by both parties to be obligatory on the principal—yet upon each of these points the common law holds otherwise, and has obstinately refused for hundreds of years to accommodate itself to the undoubted intentions of the parties whose rights it determines.

“ Either the common law has within itself the flexible, elastic, and accommodating elements, which would have enabled the courts to adapt it in these respects to the expanding exigencies of society, or it has been greatly misunderstood or misrepresented by the opponents of the Code.

“ The second of the reasons for considering a Code more favourable to progress than the common law, is that, in all the particulars in which the common law does take hold of the business and usages of society, and make use of them in jurisprudence, it does so, not so much by way of incorporating these usages into the law, or indeed making any change in the substance of the law itself, as by way of interpreting the acts and intentions of parties, and applying fixed principles to the ever changing concerns of human life; in all which respects a Code may and should be more liberal than the common law. Thus it is that, by the present Code, not only are the practical anomalies rectified, which have been just mentioned, but the details of the law of contracts are made subordinate to the intentions of the parties, ascertained not by inexorable rules of legal construction, but by all the light which can be thrown upon them by law, usage, and surrounding circumstances, except in those few cases where for reasons of public policy an absolute rule has been established.

“ The usages of society vary with its wants and its pursuits. The law refers to those usages, because the parties contract with reference to them, and they must be taken into account when it considers what these parties ought to do, and what they ought not to do. In this way, and in this alone, has the common law adapted itself to the exigencies of society, and in this

respect the present Code goes not only as far, but farther than the common law.

“ Having thus considered the principal objections to the codification of the law, it should next be considered whether there are advantages in it ; assuming that it is possible to have a body of written law in a convenient form, and in scientific order, containing the materials and framed in the manner already described, what benefits will it confer? In the first place, it will enable the lawyer to dispense with a great number of the books which now encumber the shelves of his library. In the next place, it will save a vast amount of labour, now forced upon the lawyers and judges, in searching through the Reports and examining and collecting cases, and drawing inferences from the decisions, and so far facilitate the despatch of business in the courts. In the third place, it will afford an opportunity for settling, by legislative enactment, many disputed questions, which the courts have never been able to settle. In the fourth place, it will enable the Legislature to effect reforms in different branches of the law, which can only be effected by simultaneous and comprehensive legislation. Thus for example, the closer assimilation of the law of real and personal property, and the changes in the relation of husband and wife as to property, cannot be effected by any other means so wisely and safely as by a general Code. The making of a Code involves the general revision of the law. It is, indeed, in this way alone that such a revision seems practicable. The occasion is thereby afforded to look at the law of the land as a whole, to lop off its excrescences, reconcile its contradictions, and make it uniform and harmonious. In the fifth place, the publication of a Code will diffuse among the people a more general and accurate knowledge of their rights and duties than can be obtained in any other manner. This is an object of great importance in all countries, but more especially in ours. If every person can have before him, in an authentic form, the laws which are to affect his property, and govern his conduct, he can have an additional guaranty of his rights, and a better acquaint-

ance with his duties. Here, more than anywhere else, all classes of citizens interfere in all the affairs of the state. They elect, directly, nearly all the officers who make, administer, and execute the laws. If in Holland, or in Germany, or France, a Civil Code has been found beneficial, much more is it likely to be beneficial to us.

“So far as the choice lies between law to be made by the Legislature, and law to be made by the judiciary, there cannot be a doubt that, whatever may be the determination elsewhere, the people of this state prefer that theirs shall be made by those whom they elect as legislators, rather than by those whose function it is, according to the theory of constitution, to administer the laws as they find them. Hence the idea of a Code has taken such a hold of our people, that they have made provision for it by their organic laws.”*

We have inserted nearly the whole of the remarks of the Commissioners, notwithstanding the length to which they extend, for sundry reasons. These remarks are not the theoretical effusions of inexperienced persons, they are the deliberate conclusions of very able and learned lawyers, who have for years been engaged in the practical production of the several New York Codes, some of which have now been in operation ever since 1850, and who have just completed their gigantic undertaking. They have borne the burthen of their task, and to a certain extent seen the perfect success of their labours. To us, too, their opinions are particularly worthy of consideration; for not only were their laws so similar to ours before they were thus codified, that the decisions in our courts were treated as entitled to the same authority as the decisions of their own courts; but the whole of our law, whether common or statutory, as well as their own, has been carefully considered, and has, to a great extent, formed the basis of these Codes. Nor have we ever seen the questions of the practicability and the expediency of Codes dealt with in so masterly a manner;

* Introduction, xiv. *et seq.*

and we are not without hope that the introduction of the Commissioners' remarks in our pages, may make them better known, and secure for them a more extensive and attentive consideration, than would have been the case if they had remained in the pages of the Codes themselves, which probably may come to the knowledge of a very limited number in England.

We shall add some remarks upon this subject. As we have already hinted, our statute law is really a collection of Codes, and those statutes which are merely declaratory of the common law, are a codification of the common law. Now, no one has ever doubted the practicability or expediency of making those statutes in any case where any doubt existed, or any advantage could be obtained. The general denunciation, therefore, of Codes in England, which is so commonly heard, rests on a great misapprehension, for we from time immemorial have had, and must always have, Codes. True it is that our statute law, for the most part, is a disgrace to a civilised community: and, as far as we can judge, instead of any improvement being made, the late statutes are quite as bad, if not worse, than their predecessors.* And here, one of the greatest excellencies of the New York Codes deserves to be noticed, to which the Commissioners have not adverted, probably because they perceived that the same excellence might exist in any statute. We mean the lucid, simple, and clear language, and the short clauses in which the rules are promulgated, and for which the highest credit is due to the Commissioners. We give three specimens.

Civil Code, s. 879—"One who sells or agrees to sell personal property as his own, thereby warrants that he has a good and unincumbered title thereto."

S. 833—"One who sells or agrees to sell an article of his own manufacture, thereby warrants it to be free from any latent defects, not disclosed to the buyer, arising from the process of

* In *Letton v. Goodden*, decided March 21, 1866, speaking of a section in a statute passed in 1859, V. C. Kindersley said, this section is "*a most extraordinary jumble of words, and loosely drawn, as most acts of Parliament are.*"

manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein."

S. 902—"When property is sold by auction, the auctioneer, or his partner, or clerk, may enter in a sale book, at the time of the sale, a memorandum specifying the name of the person for whom he sells, the thing sold, the price, the terms of the sale, and the name of the buyer. A memorandum thus made binds both the parties in the same manner as if made by themselves."

Now, it is impossible to doubt the great advantages of enactments framed with such perspicuity and brevity, and whatever opinions may be entertained on the question of codification; no difference of opinion can, we imagine, exist as to the expediency of framing all our statutes in a similar manner. Many of the defects so common in our statutes arise undoubtedly from the phraseology and prolixity of the clauses. An ordinary member of our Legislature is frequently deterred from attempting to master the details of a bill by the language in which it is couched; and if he should endeavour to master the details, it is highly probable that he will not thoroughly understand them. Simplify the language and shorten the clauses after the example of these Codes, and any member will readily master the meaning of every clause in a bill, and perceive the bearing of the whole; and the result will be that many a useful, because practical, suggestion will be forthcoming from members, who at present are deterred or incapacitated by the frame of our bills from taking any part in the endeavour to render them as perfect as may be. Again, statutes thus clearly framed would be easily intelligible by all persons of ordinary understanding. The result would be that fewer disputes would arise; less frequent reference to attornies or counsel would be necessary, and when such reference was made, more clear and decisive opinions would be given. Nothing, in fact, would more strongly tend to prevent litigation. Lastly, we should very rarely meet with those difficulties, which are now so perpetually arising, on the construction of statutes, and which give such a large

amount of labour to the judges, who are forced to put some construction upon the confused and ill-framed clauses, which abound in our statutes.

As to the objection founded on the probability that uncertainty would be introduced by a Code, two remarks may be made. The first is that, if the Code be framed with due care, the probability is that this objection will rarely exist; and that the certainty created by the Code in other cases will far outbalance any inconvenience that may arise from this supposed uncertainty. The second is that this objection is commonly rested upon the number of decisions which have taken place under Codes or Statutes, without adverting to the fact that a large proportion of these decisions have not been called for by any imperfection in the wording of the enactments, but by the nature of the subject-matter to which they apply, and that equally numerous decisions have been called for in cases depending upon the common law alone. How numerous have been the decisions upon the Statute of Frauds, irrespective wholly of its wording. How many are the cases upon the common law offences of murder, burglary, and larceny.

As to the supposed superiority of the common law, they who rely upon it seem to overlook several very serious defects.

When we speak of the common law, we mean that body of law which is contained in our books and reports, and which depends in no respect upon any statute. Now any one, who is really conversant with this law, must be perfectly well aware that there are innumerable points which are in the greatest doubt. Nothing, therefore, can well be more incorrect than to assume that such a law is so certain as to justify any one in founding an argument upon its certainty. Again, a great part of our common law is founded upon the decisions of the courts. Now the first thing that must strike any one is this strange anomaly. No record of any judgment is admissible in evidence against anyone who is not a party or privy to it, upon the sound ground that no one ought to be bound by a judgment in a case in which he had no right to be heard; and yet the

law, upon which the judgment proceeded, and which may have been then enunciated for the first time, is held to be binding in every other case where the same question arises. It would be answered, no doubt, that the decision proceeded on the previously existing law; but this is one of those fallacies which bring no credit to the law. Again, it cannot be doubted that there are many decisions which would have been reversed by a superior court, and in these instances the law is fixed by the accident that the parties submitted to an erroneous decision against them. Nor are the reports of the decisions by any means trustworthy. Where a written judgment is printed, that judgment must of course be taken to be correct; but it is possible to imagine that even in such a case the facts may not be accurately represented. But where no written judgment is delivered, errors may, and, no doubt, often do occur, even with very careful reporters. Lastly, a decision is constantly relied upon, not for what was actually determined by the court, but for what may be inferred from it, though that may never have entered the minds of the judges. On the whole, so far from the common law, as found in our books and reports, being a safe ground whereon to rest an argument against a Code, an accurate knowledge of the state in which it really is would satisfy any reasonable person that nothing is more desirable than that, by some means or other, it should itself be freed from doubts and difficulties, and reduced into a plain, clear, and intelligible body of law.

If any one will carefully examine and candidly consider the New York Codes, little doubt can be entertained that he will come to the conclusion that Codes are practicable and expedient in every State where it is possible to enact them. At the same time it is quite clear that with the present prevalent opinion against them in England there would be no chance of a Code becoming the law (even if there were the means of framing one), if such a Code were framed upon the comprehensive plan of the New York Codes; and the same strong opinion would probably prevent Parliament from granting

funds to enable the Government to employ competent persons to prepare such a Code. Nor is this the only difficulty. The perfection of a Code depends not merely upon the accuracy of each particular clause, but on the general harmony and conformity of the whole. Now it is highly improbable that either House of Parliament would adopt bills for codifying the law without examination and alteration; and if a Code were to pass through such an ordeal, it is vain to hope that it would escape without so much alteration as to render it extremely imperfect. It is exceedingly difficult to pass even a short bill unmutated; and the longer a bill was, and the more artificially it was framed, the more would that difficulty be increased.

It appears, therefore, to be plain, that in the present state of opinion, and in the present course in passing bills, there is no reasonable expectation that a Code framed after the pattern of the New York Codes would pass into a law.

The question then arises, what is the best mode of legislation which, in the present state of things, may be practicable?

In the case of the Criminal Law Consolidation Acts, a consolidation of the law, coupled with all such amendments as seemed expedient and necessary, has proved a complete success. In these, the wording of the Acts consolidated was followed as far as it was possible, and no attempt was made to include any part of the common law. It may, therefore, be supposed, that a similar mode of consolidation would be expedient in other cases. It is, however, to be observed, that the enactments collected in the Criminal Law Consolidation Acts differ very materially from most others. For the most part these clauses had little, if any, connection one with another, and consequently there was little danger when they were taken from different Acts and placed together in the same bill, that inconsistencies would arise between the clauses. They, therefore, cannot be regarded as proving that a similar consolidation would be equally successful in other cases; indeed it is obvious that such a consolidation would necessarily be open to sundry of the same difficulties as we have pointed out in the case of the mere consolidation of

statutes without alteration or amendment. Nor must it be forgotten that it was necessity alone which caused the form of the old statutes to be so scrupulously adhered to in these Acts, and the result is anything rather than such a specimen of legislation in language and form as deserves to be held up as a pattern for future legislation. It fails, too, in being confined to the statute law alone.

Another proposal, which seems now to be in favour with some persons, is a Digest of the common law. At present we have neither seen any specimen of such a Digest, nor any clear and distinct statement of what it is intended to be, and as far as we are aware it is the mere theoretical excogitation of gentlemen who have never attempted to frame a single page of such a Digest. We have already had a practical proof of the danger of embarking in any scheme of legislation, without first testing and trying how far it may be possible, in the consolidation of a statute law—a work which is to all appearance an infinitely easier task than any Digest of the common law would turn out to be.

As we have no specimen or distinct statement of what such a Digest is intended to be, we can only view it in the several lights, in which it may be capable of being contemplated. Of course it must be in writing. Then is it to be passed as a statute, or to have the force of a statute? If it is not to have the force of a statute, it will be of no more authority than a text-book, and the judges will be no more bound by it than they are by a text-book. Now, the great use of any Digest or Code of the common law would be in its finally settling doubts, removing inconsistencies, and doing away with all objectionable law; and whatever course may be taken, the primary object should be to frame a collection of law that should bind judges and every one else alike. If it is to be or have the force of a statute, call it by whatever name you please, it is a Code, and it will be binding on every one alike. Then what shape is it to assume? Is it to be in simple legal propositions, or in prolix clauses? If in the former, it will be

exactly the same as the New York Codes. If in the latter, it will be open to all the objections which can be raised against a fixed rule of law, with the addition of every objection which may arise from its greater prolixity. One great objection so much relied on against a Code is that doubts will arise upon its language; now, it is perfectly clear that the more words you use in a clause, the more points of attack you furnish; and consequently on this ground alone a long clause is worse than a short clause. Again, is it to be a Digest of cases briefly stated? If so, and these cases are to be stereotyped by statutes, we cannot conceive a more mischievous proposal. It is perfectly clear that it is a very [much easier task to write a legal principle in clear language than it is to abstract the facts of a case so as to omit nothing that is material, and insert nothing that is immaterial. Long experience has taught us that a case may be abstracted with every care to secure accuracy; a new case shall arise, and lead to a fresh examination of the old case, and it will be found that the new case has drawn attention to facts in the old case, which were thought immaterial before, and not abstracted. The conclusion, in fact, to which we have come, without any doubt, is that the cases must remain as they are, and that the only use that could safely be made of them is to refer to them as examples, as the New York Commissioners have done, for the purpose of illustrating the provisions of the Digest. A further question is how are erroneous or discordant cases to be dealt with? It often happens that an erroneous decision purports to proceed upon perfectly sound grounds, and that either the grounds have been misapplied or the facts misreported, so as to make a decision that really was right appear to be erroneous. Are such cases to be declared erroneous simply, or is the correct principle to be laid down? If the former, will not the correct grounds be shaken? If the latter, the plan of the New York Codes will be followed. Again, how far back is the digest to extend? The Year Books are occasionally spoken of as if they were useless. It may be doubted whether a great part of the conflicting deci-

sions of recent years may not be owing to the prevailing imperfect knowledge of our old black-letter law. It cannot, however, be doubted that Chancellor Kent was well warranted in his regrets that the Year Books had not been translated and rendered accessible to all; and one of the many benefits which Lord Romilly has conferred on the public is the printing of the MSS. Year Books with an English translation; and it is to be hoped that he will urge the Government to print all the other Year Books in a similar manner. To form a Digest of our law and omit the Year Books and other old Reports would be pretty much as wise a proceeding as to make a statue without a head. If there is to be a Digest of cases, has it been considered what its size will be? Viner's Abridgment is twenty-one volumes. Could a Digest of the existing cases be contained in forty?

Again, a Digest of the common law alone is simply impracticable; for it has been altered in numberless instances by statute, and the law on many subjects consists partly of statute and partly of common law, and as in a text-book both the one and the other is given, so both must necessarily be given in a Digest of the law. What is wanted is the most harmonious body of the whole law upon every subject. To frame a Digest of the cases would take great length of time, and would, in all probability, prove a failure in the end. If a fair experiment were made it would soon be seen that abstract principles must be enunciated, and certain rules must be given, especially where doubts and difficulties existed. The great fault of our case law is that each case is a single instance of some supposed rule of law, but there is no authoritative declaration of that rule anywhere. But if a Digest is to be framed it must of necessity enunciate the several rules of the common law, even if it subjoin a Digest of the cases bearing upon the rule. What would a Digest of the law of contracts be which contained no statement of what constituted a contract?

In one respect the movement in favour of a Digest seems to

be deserving of being looked upon with satisfaction. The promoters of a Digest must, it should seem, be satisfied that there is no insuperable objection to reducing the common law into writing; and this seems to narrow the question into what is the most practicable and expedient method of reducing both common and statute law into writing.

We shall now proceed to point out what appears to be not only a practicable, but the most expedient, course to be adopted under the existing state of circumstances in England.

This course is, to consolidate the common and statute law by a number of different Acts passed in a regular series, year after year, and all framed upon one and the same uniform system. Each bill should be confined to one particular subject, and should incorporate all the statute and common law upon that subject. The plan on which each bill should be framed should be this: every existing enactment upon the subject should be collected and carefully examined, useless and objectionable provisions should be rejected. All the common law upon the subject, and all the decisions, whether on the statute or common law, should be considered. From these materials a bill should be framed, containing, in addition, all such real and practical amendments as may get rid of all doubts that have arisen, and may provide for every point that experience may have shown ought to be dealt with. The bills should be framed in the simplest and plainest language, and in the shortest clauses; and to this extent at least the New York Codes may well serve as examples.

The advantages of such bills as these would be that they would be a vast improvement on the present law: they would represent the law in its best possible shape down to the time of their passing, and each of them would, as far as possible, contain the whole of the law upon the particular subject; but in order to avoid the possible omission of any point of the common law, it would be prudent to provide, that in case any such point should arise, it might be determined in the same way as it would have been if the Act had not passed.

Every bill should be passed so as to be wholly independent of any other bill, so that it could not be affected by the failure or repeal of any other Act; and every bill should be made as short as it could be. A short bill is much more likely to excel a long bill in these respects. Inconsistencies are less likely to arise in framing it; it will be better understood in Parliament, and the effect of any alterations during its passing will be more readily seen, and mischievous alterations more easily avoided; and when it has become law it will be much better understood by counsel who have to advise, and by judges who have to decide, upon questions arising under it. In some cases, however, the subject may be so extensive that it may be advisable to divide it into separate bills.

By adopting such a course the law would be gradually and steadily amended. Every bill would be some advance towards the amelioration of the law; the progress, however, that would be made would depend upon Parliament, and one great advantage of the course suggested would be that it would always be possible to make it exactly correspond with the power of Parliament to carry it into effect. The vast and increasing amount of business that must necessarily be disposed of by Parliament in each Session leaves very little time for the reconsideration and amendment of the existing law, and therefore it cannot be anticipated that it would be practicable to pass more than a few of those bills in each Session. A sufficient supply, however, might always be provided, and if the bills were introduced in the House of Lords at the commencement of each Session, they would probably be well considered there in the first instance, which might facilitate their passing in the Commons, and any bills that failed in one Session might be again introduced in the next.

No doubt the course thus suggested holds out no hope of a very speedy riddance of our present statute book. It is no grand and magnificent scheme: on the contrary, it is a plain and practical one, which, if fairly dealt with and earnestly carried out, is certain to secure a larger amount of real benefit

than any other that can be suggested. In the present state of things any great scheme embracing the whole of the law, or even the whole of the common law, would undoubtedly fail through its greatness alone. No one would master it, and neither House of Parliament would sanction it without consideration, and neither House could devote the necessary time to its consideration. But the plan suggested would be exactly adapted to the present state of Parliament, as such a number of bills might be submitted to each Session as would just occupy so much time as could be devoted to them. At first it is probable that each bill would be narrowly scrutinized; but if the course were steadily pursued, year after year, and due care devoted to the preparation of the bills, Parliament would gradually become inclined to give greater confidence to the bills, and a greater number might be passed Session after Session. If the subjects, which are most commonly called into operation, were selected in the first instance, the Acts would soon be tested, and if, as there is no reason to doubt, they proved to be beneficial, they would give a strong impulse to the passing of other bills.

Whilst, therefore, we foresee that in carrying out this plan to completion many years might be expended, still it may reasonably be anticipated that the time would not be so long as at first sight may appear necessary, and if the selection of the subjects we have suggested were made, we should in a few years have excellent statutes upon all the subjects which ordinarily affect the members of the community, and any delay in dealing with those parts of the law which rarely are resorted to would be less material.

This plan possesses also this farther advantage, that it is open to the easiest amendment in any case where any defect should be discovered. Amending statutes, where the Act amended is still permitted to remain, are very objectionable. If a short statute required amendment, nothing would be easier than to pass a new bill properly amended. If my house is covered with slates, and any one of them fails, I can easily

substitute a new slate without disturbing any of the rest, and the roof becomes as good as ever. So if a short statute fails, a new one may easily be put in its place.

No doubt a Code, such as the New York Codes, extending to such a wide range as they do, has its advantages in its wider scope and more scientific shape, but if defects in it are found, it must either be wholly reinstated with amendments or the amendments must be in separate statutes. But it must be admitted on the other hand, that the power of amendment afforded by substituting a new short statute is a very great advantage.

Nor are we entirely convinced that for *practical purposes* the laws of a country may not quite as well be contained in two hundred short statutes as in five Codes embracing identically the same quantity of law. In saying this, we of course assume that the same principles are in each case steadily adhered to and carried out without any deviation.

It is also to be remembered that every Session is certain to produce its crop of new Acts, and if these be framed in the same manner as the consolidation statutes, they will harmonize with them, and all form a uniform body of law. An advantage that would not be attainable if there were one or more Codes.

Although it is true that we have no precedent precisely the same as each of the proposed bills would be, as we have no Act by which it has been attempted to consolidate the common law, yet we have in the Acts which of late years have been passed for the consolidation of certain parts of the statute law, precedents for the consolidation of the statute law; and there is one class of statutes which goes a long way in support of our proposal. We allude to Sir Robert Peel's Acts for the consolidation and amendment of certain parts of the criminal law (the 7 Geo. IV., c. 64, 7 & 8 Geo. IV., c. 29, c. 30, and c. 31). Now these Acts were framed precisely upon the principle which we are advocating; all the old enactments were carefully collected and examined, everything obsolete, useless,

and objectionable was thrown aside, and every reasonable and useful amendment, whether of the previous law or to provide for the future, was adopted, and the whole of each of these Acts was framed in uniform and consistent phraseology. The only amendment to the mode in which these Acts were drawn which can be suggested is the simplification of their language, and the abbreviation of their clauses. But although these Acts did not attempt to deal with the common law, the manner in which they dealt with the doubts and difficulties in the former law and with the introduction of new provisions may afford a useful example in dealing with the common law itself. If by a statute the conflict between decisions and statutes can be done away, in like manner the conflict between the decisions upon questions on the common law may be solved; and if new cases can be provided for by statute, a *fortiori* of the old and well settled rules of the common law can be enunciated by statutes.

At present there exists no machinery for carrying into effect the plan which has just been suggested, and it is obvious that a new machinery must be brought into existence for this purpose. But, as the framing of Acts of Parliament applies as well to the ordinary work of each Session as to these consolidating Acts, the machinery ought to be adapted to the one as well as to the other. A few years ago the House of Commons passed a resolution, on the motion of Mr. Napier (late Lord Chancellor of Ireland), that a Board ought to be appointed to superintend the legislation in both Houses of Parliament; and the more the matter is considered the more evident will it be that a Board is the only effectual means, by which any real and practical amendment can be secured in the ordinary course of legislation, and in the consolidation of the existing law.

In order to frame good laws, the largest knowledge of the existing law, and the widest practical acquaintance with its working, are requisite; and at present one of the principal causes of the manifold defects in statutes is that they have

been framed by persons who either were ignorant of the existing law or of its working, or of the subject-matter to which the new Act was to apply. The members of the Board, therefore, ought to be the ablest and most experienced lawyers that could be induced to accept the office. At present the practice of the law is so divided, that it would be a difficult, probably an impossible task, to find lawyers possessing great practical experience in all the divisions; consequently it would be necessary to select those who possessed the greatest experience in particular branches; and although, if it were obtainable, a Board composed of those who possessed very great experience in every branch might appear most likely to prove the best, yet it cannot be doubted that large experience in one branch would often afford material assistance on questions arising in another, and that Acts framed by the combined exertions of such men would be not only very good in themselves, but would be excellently adapted to the particular subject-matter to which they were applied.

Of all the functions which the governing power of a state discharges, there is none so important as that of legislation. It is obvious, therefore, that the very best assistance ought to be given to the process of legislation; and this can only be attained by enlisting the very ablest lawyers in the work. In order to obtain their assistance, they must be placed in a position, and receive a remuneration, which will secure their services. To the duties they would be required to perform it would be necessary that they should devote substantially the whole of their time. Their salaries ought to be commensurate with the position they held, the duties they performed, and the benefit that would accrue from their labours to the public at large. No one doubts that a judge of a common law court well deserves the salary that he receives for the duties he performs; a great part of these duties is devoted to questions which merely affect the parties between whom they happen to arise, and it can hardly be doubted that the benefit which would be reaped by the community at large from the labours of each

member of the Board, would be at least equal to that reaped from the labours of a single judge in the course of a year; and this affords a sound reason why the members of the Board should receive an equally handsome remuneration. The annual expense of printing alone for the Houses of Parliament is, if we mistake not, considerably more than £100,000 a year. The greater portion of this sum is spent in order to enable the Legislature to determine upon proper bills to be passed, and assuredly, if it be expedient to expend such a sum for that purpose, it is much more expedient to spend a third of that sum, in order that the larger sum so spent, and the labours of the House, may result in the passing of Acts, which are framed in the best possible manner to effectuate the ends to which they are directed. Of the amount of benefit caused by well framed bills, it is impossible to form an accurate estimate. The best Acts work silently; being correctly framed no questions arise upon them, and consequently nothing is said about them. So of the amount of mischief caused by badly framed Acts no accurate estimate can be made, but it is unquestionably very much greater than is ordinarily supposed. The public in general are only aware of the cases which come before the courts, but these are few indeed in comparison with those in which the opinion of counsel is taken. It is, indeed, no uncommon thing for one counsel to have to answer sundry cases upon a single clause. But though nothing like an accurate estimate can be formed of the amount of mischief arising from this cause alone; no one who has noticed the number of cases which of late years have been decided in the courts upon the construction of statutes, can doubt that their imperfect preparation is a great public mischief, which loudly calls for a thorough and complete remedy.

Experience alone can determine the number of which the Board must consist; but it is difficult to suppose that less than five would be competent to dispose of the work which would fall upon them. Many bills would require much consideration, and every bill which passed a second reading ought to be con-

sidered ; and when a Session draws near to its close there is generally a great pressure with many bills.

The president of the Board ought to be a member of the House of Lords, and the other members ought to be *ex officio* members of the House of Commons, so far as to be entitled as such to be present and explain anything which might be requisite, and point out any objections to any amendment that might be proposed. There is no greater cause of defects in Acts of Parliament than that the person who has prepared a bill has no opportunity of defending its provisions in either House, or of pointing out the objections that exist to any amendment that may be proposed. The peer or member who has charge of a bill has, in most instances, merely a general knowledge of the bill, but is very rarely so familiar with its details as to be able to deal satisfactorily with questions unexpectedly raised as to them. Again, it is highly expedient that the bills for the consolidation of the law should be in charge of a member not necessarily connected with the Government. Such bills ought never to be treated as party measures, and though they ought to be supported by the Government, yet a change of Ministry ought not to cause them to be dropped ; but they ought to be steadily proceeded with under every Administration alike. The Lord Chancellor and the law officers of the Crown have so much upon their hands that it would be a great relief to them to be freed from the charge of such bills altogether. At present great benefit arises from the free communication which takes place privately between the members of each House and the member in charge of a bill, as to objections to and amendments in it, and this free communication would take place if the members of the board, or some of them, were in each House, but not otherwise.

Whenever a bill was sent before a Select Committee of either House, a member of the Board ought invariably to attend the Committee. This would not only greatly tend to secure the bill passing without injury, but it would very materially lessen and expedite the labours of the Committee. It

was by similar means that the Criminal Law Consolidation Acts were passed in the satisfactory state in which they are.

We may now point out the principal duties of the Board. Every bill which seemed likely to pass should be transmitted to the Board. This should be done either when the bill had passed a second reading in the House in which it was introduced, or at any other time that either House should order. Whenever a bill was submitted to the Board, it should be their duty to examine it, and report to the House as to the alterations it would make in the law, and as to its objects and effect, and especially to point out any defects and imperfections in it, and the means by which they might be remedied. The Board should also be at liberty to reframe the bill, in whole or in part, so as to put it into the clearest language and the best form. Amendments intended to be proposed by members are often printed, and whenever that was done they should be sent to the Board, and the Board should deal with them in a similar manner to the bill. In all these things the Board should merely act as the counsellor and assistant of the House; everything should be done by way of suggestion only, and for the purpose of enabling the House to form a correct judgment upon the nature and effect of the bill, and to pass it, if approved, in the best possible form.

The Board should have power to draw up rules for the direction of any persons who framed bills, and these rules, when approved by the House, should be binding upon all framers of bills. These rules might direct the general framework of bills, the mode of repeals, the use of particular expressions, and any other matters which frequently occur, and in which it is desirable to procure uniformity.

Any member should be at liberty to call upon the Board to prepare or correct any bill for him. The Board, when so called upon, should point out to the member any objections to the bill, which, after due consideration of it, occurred to them, but they should, nevertheless, be bound to prepare the bill in the best manner they could to effectuate the intentions of the

member, if he still desired to proceed with it, leaving their objections to be dealt with by the House itself. This course would probably soon induce all independent members to apply to the Board to prepare their bills. It would be seen that every bill so prepared would come before the House with the sanction of the Board, as to its framework, details and language, which would place it in the most favourable position for the consideration of its principle and provisions.

Either House should have power to direct the Board to frame any clauses to carry out any resolution of the House, or to consider and report upon any proposed alteration of the law.

It cannot be doubted that such a Board, acting as the counsellor and assistant of the Houses, in suggesting and pointing out the advantages of, and the objections to, bills, and in rendering them as perfect as possible, would produce the most beneficial results. Their known experience and acquirements would induce independent members freely to resort to them for information and assistance, and their recommendations would carry with them all the weight to which they were entitled from the ability and learning of the Board, and from their standing in a perfectly impartial position as advisers of the Houses. Questions which now frequently occupy much time in both Houses, would be discussed with, and considered by, the Board, and in many instances would not come before either House. By this means much valuable time would be saved, and as the bills when settled by the Board would leave the Houses only to deal with their principles and details, not only would they be in a better state to be understood and considered, but they would be dealt with more satisfactorily and speedily by the help of the observations of the Board upon them. On the whole the result would be that much time would be saved in both Houses, and infinitely better measures would be passed.

Whilst Parliament was sitting, the whole of the time of the Board would probably be occupied by attending to the bills introduced; but during the rest of the year the Board should

devote their attention to the preparation of bills for the consolidation of the statute and common law, according to the plan that has been suggested, so that a sufficient number of them should be ready to be introduced at the commencement of each Session.

In case any decision in any court, or any particular state of circumstances occurred, which called for any amendment of the law, the Board should be prepared with a bill at the beginning of the next Session to remedy the mischief.

As to private bills, the time of the Board would probably be too much occupied to allow them to attend to their wording or minor details; but they might frame general rules as to them, with the sanction of the Houses, and they might, with great advantage, be empowered to object to the introduction of sundry clauses, which improperly affect the community at large.

Where great measures excite strong parliamentary contests, it may, perhaps, be supposed that the Board would be useless; but it may well be doubted whether this would be the case, as it is difficult to conceive that they might not in any case assist the Houses in carrying out their resolutions in the fittest language; but if, either from want of time or otherwise, instances should occur where the Board could not assist, this would by no means detract from their general usefulness in all other cases.

If it be suggested that the members of neither House would like the interference of a Board, the answer we should give is twofold. If the members were treated with courtesy and attention, and their proposals fully and candidly weighed, and the bearings for and against them calmly stated, it is but reasonable to suppose that the Board would obtain general favour and support; and, secondly, our experience, as well of Committees of both Houses, as of individual members also, convinces us that there is an honest desire to effectuate what is believed to be the best, and a perfect readiness to hear the merits of any proposal discussed in order to come to a right

conclusion upon it, and that a willing ear is always lent to the suggestions of the framer of a bill.

Nor are precedents wanting which fully support the constitution of such a Board. It is one of the most ancient privileges of the House of Lords that "they have a right to be attended, and constantly are, by the judges of the Court of King's Bench and Common Pleas, and such of the Barons of the Exchequer as are of the degree of the coif, or have been made serjeants-at-law; as likewise by the king's learned counsel, being serjeants, and by the masters of the Court of Chancery, for their advice in point of law, and for the greater dignity of their proceedings."* "Formerly all bills were drawn in the form of petitions, which were entered upon the parliament rolls with the king's answer thereto subjoined; not in any settled form of words, but as the circumstances of the case required; and at the end of each Parliament the judges drew them into the form of a statute, which was entered on the statute rolls. In the reign of Henry V., to prevent mistakes and abuses, the statutes were drawn up by the judges before the end of Parliament; and in the reign of Henry VI., bills in the form of Acts, according to the modern custom, were first introduced."†

Here, then, we have the long-accustomed usage of the very best legal advice being given to the House of Lords, and the ancient usage of statutes being framed by the judges. The time of the judges is now too well occupied to allow them to frame Acts of Parliament; but the old usage affords a very good precedent for establishing a Board of the most experienced and able lawyers, who can be induced to accept the office, in order that they may assist each House with their advice, and frame each bill in the best possible manner.

Such a Board, so constituted of the ablest and most experienced lawyers, devoting the whole, substantially, of their time to the duties of their office, would afford an assistance

* 1 Bl. Com., 167.

† 1 Bl. Com., 181.

to both Houses such as is extremely needed, and than which no better could possibly be obtained. Every year that passed would add to their experience, not only in the framework, but in the substance of Legislation, and the bills produced by them would gradually advance to a degree of excellence, from which the present statutes are indeed far distant, but which it is most expedient for the public at large that they should attain. It must be remembered, however, that the success of the plan will necessarily depend upon the very best possible Board being constituted. No niggardly parsimony or contracted views ought for a moment to stand in the way of such an important institution. Her most gracious Majesty's benign sway has been said to extend over one-fourth of the human race,* and our statutes are looked upon as examples and followed as guides in the United States and elsewhere. What duty, then, can be so pressing—what object can be so noble, as to provide the very best means for securing the enactment of the very best laws? We glory in the spread of our arts, our sciences, and our civilisation to the uttermost parts of the earth; how much more glorious would it really be to enact statutes for the whole of the British dominions in so perfect a form, that whilst they contained the best laws for the subjects of Queen Victoria, they might serve as admirable examples for other states in the formation of their own!

ART. II.—BROOM'S CONSTITUTIONAL LAW.

Constitutional Law Viewed in Relation to Common Law and Exemplified by Cases. By HERBERT BROOM, LL.D., Barrister-at-Law; Reader in Common Law to the Inns of Court; Author of "A Selection of Legal Maxims;"

* *The Times*, October 5, 1861.

"Commentaries on the Common Law," &c. London : William Maxwell.

ALTHOUGH we have read Mr. Broom's work with much pleasure and profit, we are, on the whole, inclined to think that it would have been better if he had adhered to the plan which he originally proposed to follow. It seems that on a suggestion of Mr. Phinn, Q.C., Mr. Broom applied himself to the task of selecting and illustrating a series of leading cases upon constitutional law, without any attempt at classification, and with only such annotations as were necessary to show their significance and bearing. This idea, however, he was subsequently induced to modify, by limiting the scope of his undertaking in the manner indicated in the present title, and by arranging the cases and grouping them together according to their relation to each other.

Now we can scarcely give our approval to the method which Mr. Broom has adopted, nor do we quite appreciate the theory of the relation between constitutional law and common law on which he professes to proceed. Instead of giving us a selection of leading cases, illustrated in the manner so successfully adopted by the late Mr. J. W. Smith, and by Mr. Tudor, his work is substantially a treatise on constitutional law with respect to the relation of the subject to the Crown, to the Executive, and to Parliament, exemplified by cases. These cases are no doubt all extremely interesting and important, but they come in rather awkwardly as illustrations of the different topics of which he treats, and although judiciously enough abridged, yet occupy so considerable a space as to violate in no slight degree all correct rules of literary perspective. Viewed as a treatise, the work would have been quite as valuable as it is had the cases which are given nearly *in extenso* been incorporated into Mr. Broom's text in a condensed form, with references to the original authorities, whilst in the estimation of most persons, we think, it would have been a great deal more readable. On the other hand, viewed

as a collection of leading cases, the work would have been more convenient in form, and more suitable both for study and reference, had it simply followed what is now a recognised form of legal literature. In attempting to combine two discordant methods—to fuse together the commentary and the selection of leading cases—we cannot but think that Mr. Broom has fallen into a mistake, which, considering the labour he has bestowed on the work, and the valuable materials he has collected, we very much regret.

With respect to the other point of demurrer which we have stated, we think that Mr. Broom is under some slight misapprehension as to the relation between constitutional law and common law. In our opinion it is the relation of a part to the whole, but Mr. Broom seems to consider that one is extrinsic to the other. We have always been accustomed to reckon it a happy peculiarity of the constitutional law of England that it is part and parcel of the common law, that there is no formal boundary by which it is marked off from the rest of our legal system, and that the great principles of the common law regulate alike our rights and duties with respect to the Sovereign and with respect to each other. The common law of England is no mere system of *jus privatum*. What would Lord Coke have thought of such a notion as Mr. Broom seems to sanction? In what light would Lord Somers have considered the following sentences of our author?—

“By constitutional law I would be understood to mean the aggregate of doctrines and sanctions directly tending to the maintenance of our social union. By common law, I would be understood to signify the aggregate of rules and maxims written or customary, directly tending to the maintenance of private rights—to the enforcement of private remedies. Constitutional law I would regard as applying itself to the solution of questions which concern the Sovereign, the state, the cohesion of society; whereas common law applies itself to resolving questions between party and party, questions of a strictly private nature, uninteresting to, because unaffecting, the community at large. According to this view, the relation of

constitutional to common law is that of law regulating and assuring the stability of the empire, to law regulating and assuring the maintenance of private rights."—Preface, pp. vii, viii.

We need hardly remind Mr. Broom that Serjeant Ashley was committed to the Tower in the 3rd Charles I. by the House of Lords only for asserting, in argument, that there was a "law of state" different from the common law.—5 St. Tr., 151.

Of course we perfectly well understand what Mr. Broom means in the passage we have quoted; but we think he has committed a mistake in limiting the term common law to those rules and maxims which tend to the maintenance of private rights and the enforcement of private remedies. Even with the correction which seems to us obvious, we are not prepared to admit the broad distinction which he draws between such rules and maxims, and the doctrines and sanctions which tend to the maintenance of social union. The law of England, it is obvious, does not draw any such distinction, either formally or virtually, and it is very difficult for one imbued with the true spirit of English law to consider these matters as distinct even in abstract contemplation. In the first place, Mr. Broom is entirely wrong in supposing that questions of a strictly private nature, under our system, do not affect the community at large. It concerns the whole community that justice in any particular case should be properly administered, whether the question relate to a poor-rate or to ship money; and every judgment in a court of law will be applicable to all other cases of a similar nature. Again, does Mr. Broom consider such cases as *Ashby v. White*, and *Semayne's case*, as having reference to private rights or to social union, or as comprehending both? What does he say as to *Sommersett's case*, where the rights of the negro might have been asserted as well in an action for false imprisonment, as in the proceedings adopted? The truth is, that the law of England does not, except in certain particular cases, contemplate social order as one of its direct

objects, but that it ensures social order by protecting and maintaining the rights of the individual, whether those rights belong to him as a person, as an owner of property, as an inhabitant of a parish, or as a member of the state.

Passing, however, from these considerations, which we have ventured to submit, we have much satisfaction in bearing testimony to the substantial merits of the work itself. The arrangement which Mr. Broom has adopted is clearly set forth by him in the following paragraph—

“The plan proposed may thus be explained and vindicated: 1st. The subject may be viewed in relation to the sovereign power of the realm ; the tie which binds him to it may be examined ; the duties which he owes to it may be investigated ; the means of redress which he has against it may be specified ; and so reciprocally may the obligations imposed on the Sovereign towards his subjects be examined, and the position occupied by the Sovereign relatively to them be defined : 2ndly. The Executive Department of the State puts in force and executes the laws ; it is distinguishable from that which deliberates and legislates. The Executive acts, through public servants and officials, civil, military, or naval ; and in Part II of this volume I shall endeavour to show what are the rights of the subject against such public officers ; what are the immunities specially extended to these latter : 3rdly. I shall speak of the relation of the subject towards Parliament, and of the conflict which has ere now occurred (even in our own time), and may again be possible, between the Common Law of England, and the Law of Parliament.” Pp. 1, 2.

We have no hesitation in saying that Mr. Broom has fully performed what he has here promised, and that he has presented to the profession in an accessible form a great deal of sound and important learning, which does not lie within the range of ordinary study, but which it is extremely desirable should be more common than it actually is amongst members of the Bar. It is to the legal profession that we mainly owe the preservation and vindication of our rights and liberties. In the worst of times, members of it have never been found wanting, who

have cherished the old traditions and handed them down to their successors. From the days of Coke to those of Denman and Brougham the battle has been nobly fought, and the names of those who have supported "the good old cause," are held in grateful recollection. To those of the profession at the present day who are possessed by the true spirit of English liberty, it may be that a less important task is assigned, but they too have a great duty to perform. In an age of "calculators and economists," it is almost as essential as in times of oppression to hold fast by the great principles of the constitution, and to keep alive the remembrance of the historical and legal character of the freedom we enjoy. Even in so far as a sound and thorough knowledge of the law is concerned, no man can be said to possess that who is not intimately acquainted with those principles of the Common Law which bear on our constitutional liberties.

With respect to the study of constitutional law, we may here observe that the best mode to adopt is to begin with those parts of Blackstone or Stephen which treat of this subject. After a general knowledge of the matter has thus been obtained, and the terms employed have become familiar to the student, the next and most important step will be the historical study of the subject. Hallam's "History of the Middle Ages" and "Constitutional History of England," and Mr. Erskine May's "Constitutional History" will afford him sound views and trustworthy information. Of course we should not wish to limit his historical inquiries to these works, but their study will be the best foundation for any farther investigation into the subject. No investigation, we may safely say, can be too thorough and minute. Many subjects may be tolerably well understood without much reference to their history, but constitutional law is essentially historical, and has been entirely evolved by the "logic of events." In connection with such inquiries a careful study of the state trials and of the different cases relating to constitutional law will be necessary.

As an introduction to this latter study, Mr. Broom's work will be highly advantageous. He has brought many rare qualifications to the task which he has undertaken—a thorough knowledge of the principles of English law, habits of careful and patient inquiry, and a generous sympathy with the sound doctrines of constitutional liberty. We can scarcely say, indeed, that Mr. Broom is as much at home in the present subject as in those of which he has treated in previous works; but the same discerning intellect and the same skilful hand are observable which have made the “Selection of Legal Maxims” a standard work, and have rendered the “Commentaries on Common Law” a boon to all students who aspire to know the principles of our legal system. If we may still desire a fuller treatment in all their bearings and details of the matters he has touched upon, and a more familiar acquaintance with the great questions which he has passed under review, we must at the same time recollect that there is no man amongst all the legal writers of the present day whose learning and abilities would have qualified him to accomplish in a more satisfactory manner the task which Mr. Broom has undertaken and carried into effect in the work before us.

Under his first division—the relation of the subject to the sovereign—Mr. Broom has given *Calvin's case* (7 Rep. 1, 2 St. Tr., 559) as illustrating the duties of the subject to the sovereign; and *Sommersett's case* (20 St. Tr., 1), *Bushell's case* (Vaughan, R., 135, 6 St. Tr., 999), *Darnel's case* (3 St. Tr., 1), *The Banker's case* (14 St. Tr., 1), *Bates's case* (2 St. Tr., 371), *The case of Ship Money* (3 St. Tr., 825) and *The case of the Seven Bishops* (12 St. Tr., 183), as illustrating the duties of the sovereign towards the subject. To illustrate the second head—the relation of the subject to the executive—we have *Leach v. Money* (19 St. Tr., 1,001), *Wilkes v. Wood* (19 St. Tr., 1,153), *Entick v. Carrington* (19 St. Tr., 1,030), *Hill v. Bigge* (3 Moo. P.C.C., 465), *Sutton v. Johnstone* (1 T. R., 493), and *Kemp v. Neville* 10 C. B., N. S., 523). The third head—the relation of the subject to Parliament—is

illustrated by *Barnardiston v. Soame* (6 St. Tr., 1,063), *Stockdale v. Hansard* (9 Ad. & E., 1), and *The case of the Sheriff of Middlesex* (11 Ad. & E., 273).

These cases are given in the manner we have already stated, but a great variety of other cases bearing on the different topics above mentioned is referred to and commented on by Mr. Broom.

We have had several works of late years on the English Constitution, but Mr. Broom's is the first in which an attempt has been made to treat of the dry law of the subject. Every question is discussed in a strictly professional manner, and there is a careful abstinence from any effort to present the matter in a popular or philosophical aspect. The exact method of legal argumentation has been rigidly adhered to, despite any temptations which may have existed to adopt a laxer mode of treatment. In this, we think, consists the great value of the work, at least for professional readers. Whether a more popular exposition of the different heads which it embraces might not be desirable for another class of readers, is certainly a question fairly open to argument, but the opinion we may be disposed to form on which can in no way affect our estimate of the merits of Mr. Broom's labours.

Among the observations which have occurred to us in reading the work, there are only a few which circumstances now permit us to lay before our readers. We should have been most happy, had time and space permitted, to discuss at length many questions referred to by Mr. Broom, and to enter into some historical inquiries bearing on important principles of constitutional Law. But from these we must for the present abstain, and can only add to what we have already said, some of the notes which we have made during our perusal of Mr. Broom's very learned book.

In commenting on *Sommersett's case*, Mr. Broom quotes a passage from the judgment of Lord Brougham in *Fenton v. Livingstone* (3 Macq. Scotch App. Cas., 538), where his lordship, after adverting to the principle, that *status* acquired

in one country follows a person everywhere — *sicut umbra personam sequitur*—says :—

“ Yet, when a man from a country where he was by law held in slavery comes to England or Scotland, the light of liberty chases away the shadow. He is, in all respects, free as regards his person ; and as regards his property, though in the place he came from he was a mere chattel, and whatever he earned or became possessed of in any way, while there, belonged to his master, that master could not recover it in our courts, since the principles which were laid down in *Somerset's case* in England, and in *Knight v. Wedderburn* somewhat earlier, in Scotland.”

It is obvious, however, that either Lord Brougham was under a mistake at the time he delivered this judgment, or the reporter misunderstood him, since *Sommersett's case* was decided some years before *Knight v. Wedderburn*. The latter case is reported in the “ Dictionary of Decisions,” Vol. XXXIII., p. 14, 545, and was decided in 1778, *Sommersett's* having been decided in 1772. It is to be observed, that Lord Mansfield's judgment went only to the extent that the negro was entitled to be discharged on *habeas corpus* when imprisoned by his master, but did not determine the rights of the master in other respects. The Scotch judges held “ that the dominion assumed over the negro under the law of Jamaica being unjust, could not be supported in this country to any extent ; that, therefore, the defendant had no right to the negro's services for any space of time, nor to send him out of the country against his consent.” In a note to the address delivered at Glasgow in 1860, by Lord Brougham, before the Social Science Association, his lordship mentions the correct dates of the two cases, and says that in *Sommersett's case* “ the Courts of England had not laid down the rule generally, but only that a negro could not be carried out of the country by his master.” It may be contended, however, that although Lord Mansfield's judgment did not in terms go to the extent of the Scotch judgment, yet it implied as much.

In his notes to *Bushell's case*, Mr. Broom, in referring to the objectionable practice which existed during the seventeenth century, of the Sovereign eliciting the opinion of the judges on a specific question before it had been brought before them judicially, says:—

“It must tend to the undue advancement of the prerogative, and adversely to the independence of the Bench ; besides, as observed by Chief Justice Vaughan (Vaugh. R., 382), ‘an extra-judicial opinion given in or out of court is no more than the *prolatum*, or saying, of him who gives it ; nor can be taken for his opinion, unless everything spoken at pleasure must pass as the speaker’s opinion.’ An opinion, says that learned judge, even when given in court, if not necessary or relevant to the judgment, which might have been as well given if no such or a contrary opinion had been broached, is no judicial opinion, nor more than a *gratis dictum*. ‘But an opinion, though erroneous, concluding to the judgment, is a judicial opinion, because delivered under the sanction of the judge’s oath, upon deliberation, which assures it is or was, when delivered, the opinion of the deliverer.’”—P. 149.

It appears that the last occasion when the judges were consulted by the Sovereign extra-judicially was in 1760, when, before the trial by court-martial of Lord George Sackville on a charge of cowardice at the battle of Minden, they were asked whether he could be legally so tried, his name having been previously erased from the Army List. But the House of Lords still claims the right to propound to the judges abstract questions of law without reference to any case *sub judice*. The last instance of this was in *MacNaughten's case* (10 C. & F., 200). We must, however, confess that, to our apprehension, the views expressed by Chief Justice Vaughan fully apply to opinions thus elicited, and we entirely sympathise with the sentiments of Maule J., when, in giving his opinion in the case last mentioned, he expressed the difficulty he felt in answering questions which were not put with reference to any particular case which had not been argued by counsel, and the answers to which might afterwards embarrass

judges in the administration of justice. "For these reasons," said that most able judge, "I would have been glad if my learned brethren would have joined with me in praying your lordships to excuse us from answering these questions."

Mr. Broom has in this volume considered the relation of the subject to the Crown, to the Executive, and to Parliament. He has not treated separately the relation of the subject to the judicial branch of the constitution. This he has considered, so far as he has adverted to it, under the above heads, as the cases seemed most appropriately to range themselves. We may be allowed, however, to express a doubt whether it would not have been better to have placed this most important relation under a separate head, and to have given it more prominence than he has thought necessary. Although the judges are appointed by the Crown and the authority of the courts in which they sit is derived from the Sovereign, they are as independent in their functions as the legislature itself, and many of their duties are truly of a legislative character. The judicial, it appears to us, forms a component part of the constitution, and cannot properly be merged in any other, however common may be the notion that it is only a branch of the executive. Many important constitutional questions have arisen with respect to the authority of the courts, and there are numerous cases relating to this, in addition to those which Mr. Broom has introduced, which might indeed well form a volume by themselves, and which would illustrate the more vital principles of English Law.

Mr. Broom says very truly that:—

"It is now clearly established that the governor of a dependency is liable—both civilly and criminally for his conduct in such government." P. 638.

Equally certain is the principle established by *Cameron v. Kyte*, (3 Knapp, P.P. C., 232) and recognised in *Hill v. Bigge*, from which the former, indeed, results, that:—

"The governor of a colony has not, by virtue of his appointment,

the sovereign authority delegated to him ; that an act done by him, unauthorised either by his commission or implied by his instructions, is not equivalent to such an act done by the Crown itself—and is consequently invalid." P. 645.

Unfortunately governors of colonies have not always kept in mind the limits of their authority and the responsibility they incur in over-stepping those limits. The circumstances in which they are often placed may render the position one of great difficulty ; but this only shows the necessity of appointing to such an office no one but a man who has a strong sense of justice, and a calm and steady character of mind, *Justum et tenacem propositi virum*. We would refer to the charge to the jury of Macdonald, C.B., on the trial of Governor Wall, (28 St. Tr. 51) quoted by Mr. Broom (p. 649) as containing, in some respects, a satisfactory rule for judging of the conduct of the governor of a colony in trying emergencies, although some of the expressions used would require, in our view, a slight modification.

Mr. Broom apparently accepts the judgment of the Court of Queen's Bench in *Stockdale v. Hansard* as entirely satisfactory. It would be of no use now to re-open the particular question then determined ; but it ought to be borne in mind that many distinguish constitutional statesmen, took a very different view of the matter from that adopted by the Court of Queen's Bench, and that some eminent lawyers, among whom were Lord Campbell and Lord Truro, were on the side of parliamentary privilege. We can only hope—which we do most devoutly—that the commonwealth may never receive any detriment from that celebrated decision.

Mr. Broom concludes his work by the following weighty paragraph, which, as showing the spirit which has guided him throughout, we quote with much pleasure:—

"The Constitution of our country has thus far passed through three distinct phases ; during the first of which a contest for supremacy was waged between the sovereign and his feudatories ;

during the second between the sovereign and his people—as represented by the Lower House. During the third between the sovereign and the middle classes. In the first two of these stages the contest had to be decided by force of arms ; during the last by force of public opinion. Our constitution has now entered on a fourth stage of its existence, and without vainly speculating as to the future, the constitutional historian may look forward with confidence, as he may look forward with pride. Throughout eight centuries he may look back upon a never-ceasing struggle, the gradual advance of liberty—practical and theoretical freedom of the person,—secure enjoyment of property, liberty of the press, assured. The slow recession of the prerogative, the denial of its claim to imprison arbitrarily, to legislate exclusively, to tax at will. Dimmed though the retrospect be by gloomiest shades of bloodshed and of crime, by the turbulence and violence of anarchists, by the craft and wickedness of kings, its outline is still grand. No weightier story can elsewhere be read ; nor has any passage yet been gathered from the annals of the world, yielding for the cultured intellect a nobler lesson.” P. 976.

It is with much regret that we see it announced by Mr. Broom in his preface that his “labours as a legal writer are now terminated.” We sincerely trust that he may be led to reconsider his determination to relinquish the pen. He has certainly won for himself much reputation by his writings on legal subjects ; and he is justly entitled, if he be so minded, to repose on his laurels. But much still remains to be done, if he is to do justice to himself, and if he is to accomplish all that those who estimate him truly, feel that they are entitled to expect from one who possesses so much learning and ability. Many able compilers we have, whose works are useful for certain purposes, but Mr. Broom’s powers of analysis give his writings a higher character than any mere practical treatise, however able, can possess. The true theory of the law is quite as essential to be known by everyone who aspires to be a good lawyer, as its practice, and from few writers can greater assistance in this respect be derived than

from Mr. Broom. He has certainly not yet exhausted the field in which he has so successfully laboured; and, viewing the value of his labours as we do, we cannot consent to their cessation without much reluctance, and without a deep feeling of disappointment.

ART. III.—THE LAW OF ENGLAND RELATING TO PURITY OF ELECTIONS.

BY MR. SERJEANT PULLING.

A GENERAL Election has disclosed much that is not encouraging. The produce has been gathered, and the land, which lay fallow for seven years, was found more than ever choked with noxious weeds—to be rank with corruption—and to require some extraordinary process to purify it.

The “elector-pest” which at a dissolution of Parliament becomes the prevailing epidemic, has on this occasion made such vast ravages as to leave it doubtful whether, any more than the rinderpest, it left one place wholly uncontaminated—whether in any district those from whom and by whom the rulers of the land are chosen, can be relied on as free from taint. The vigorous measures adopted by the Government in the one case have been successful. It remains to be seen whether an equally efficacious remedy may not be found for the other.

That there are in the present Parliament high-minded and incorruptible men, no one can doubt; that the great majority of the electors are corrupt few have dared to assert; that one grade in the social scale, from the working man to “the upper ten thousand,” is constitutionally tainted, it would be most invidious to contend: but, unhappily, it is but too apparent to all who have had their eyes open, that the elec-

tive franchise is at this moment possessed, to a most serious extent, by a class, in which corruption prevails, and will prevail, whilst it possesses the power to do wrong.

There is, practically, no security that any list of voters throughout the kingdom is purged of those who may be said to bear the "plague spot" upon them. Villages are no doubt to be found where every voter is an honest man, but our law makes no provision for depriving of the franchise, even members of the criminal class*—the habitual thief, the known receiver of stolen goods, the keeper of dens of infamy and vice, the extortioner and the cheat. The law in terms deprives of the franchise those who have been actually convicted of perjury or of bribery, but there is small provision made for the names of such offenders being struck out by the revising barrister, or for keeping the honest voter distinct from the corrupt, the fraudulent, and the infamous.

Whilst also the possibility of undue influence in elections on the part of the government, has given rise to a succession of provisions, specially depriving of the elective franchise, those who hold office under the Crown, the influence, however corrupt, which landlords, creditors, and employers, can bring to bear on electors is most imperfectly guarded against.

The evidence before the Election Committees this year discloses a state of things among the constituencies, in some districts, at least, as bad as in the famous days of the "rotten boroughs," when seats in Parliament were bought and sold in open market, and the patrons invited bidders for the *next presentation*; when those who made up the "free constituencies" arranged their own terms at an election, glorying in their shame, and marching to the poll with the candidate's colours, and his bank notes, stuck in their hats, as badges of honour—when both the one and the other mode of returning members to the British Parliament found apologists in high

* This defect of the law is to some extent proposed to be dealt with by the Attorney-General's Bill for abolishing forfeiture for treason and felony.

places, on the ground that "every man had a right to do what he liked with his own."

We hear now—nearly a quarter of a century after the great battle of reform was fought—of business bearing a remarkably strong resemblance to that of the old fashioned "borough-monger." Safe seats are still to be obtained in the market. The nomination rests no longer exclusively with territorial lords. Railway kings, colonial nabobs, bullion princes, and factory magnates, have also a share in the patronage. The title of M.P. may not only be reckoned on as going with a particular estate, and to be acquired by the purchaser when the estate comes to the hammer; but as appendant to other forms of investment—*e.g.*, a railway undertaking, or any other scheme which will immediately bring "grist to the mill" of a sufficient number of electors. Such an investment, in the right direction, and at the right time, no matter from what diggings the gold comes, as certainly brings with it in these days the title of M.P., as when Gatton and its senator manufactory was at the command of the highest bidder.

There are, moreover, boroughs where no patron has bought the nomination, but nevertheless where the price of the seat can be ascertained beforehand, and with tolerable accuracy. The amount payable to each voter being fixed in money, or money's worth, by a sort of tariff—varying in amount and character with the number and habits of the constituency, from the mere animal cravings of the electors of "Eatanswill," to the more thrifty, but not less costly requirements of the free and independent burgesses of "Great Selborough" and "Little Jobbington."

The business of "electioneering," on behalf of a monied candidate, is, in these days, a very remunerative one. It invites the energies of an eager class of varied attainments. London has ever ready a supply of "hands" prepared to do the bidding of a "good" candidate—dilettante political meddlers from Pall Mall—avowed "agents" with their staff of mysterious subalterns—recognisable only by a "wide awake"

appearance, and an apparently unlimited command of cash and good things. In most districts, too, there is generally a sufficient supply of men having an eye to the main chance at election times, and quite ready to embark in the cause of such a candidate—Inn and tavern-keepers, and others having horses and carriages to be hired, rooms to let, food and drink to sell, at election prices, without being too scrupulous as to the laws against treating—Printers willing to take absurdly lavish orders for posters, handbills, circulars, &c.—and a small army of the more idle relatives and friends of the electors, who, under the name of canvassers and messengers, get payment for securing their votes. The money indeed, at these seasons, flies in all directions; and a considerable number of tradesmen participate in it. Many of the junior members of the legal profession, too, get engagements with large retaining fees at elections, and no work to do, unless it be to influence and *persuade* those electors whom circumstances, not always of an agreeable character, have placed in their power.

The coercive measures to persuade the less manageable of the electors vary in their character. If the simple intimation of my Lord of Pocketborough's personal wishes does not avail, the higher pressure is put on of messages, very closely resembling commands, from creditors whom it might be dangerous to offend; from landlords likely to vent their disappointment in a notice to quit; from customers whose goodwill could hardly be lost without ruin; and, last of all, when pecuniary considerations have no weight, there still remain such primitive modes of argument as those which a hired flock of Nottingham "lams" can use with effect.

The medical profession deem it of importance to trace the history and progress of epidemics with the view to their proper treatment. The "elector-pest" seems to have been first known in this country in the sixteenth century. At an earlier period the obligation to return a member to Parliament was usually looked upon more as a burthen than an advantage; and the "Parliament man" required and received an allowance

from his electors, for his reasonable expenses.* This claim being commuted for a small fixed payment in the reign of Edward II.† the allowance in time came with the decrease in the value of money to be only nominal, and at last to be discontinued. We have curious records, whilst it lasted, of special bargains between electors and their representatives by way of compromise of the burthen on the former. Thus a record is preserved of an agreement in 1463 between John Strange, the member for Dunwich, and his electors, where the member covenants that "whether the Parliament hold long time or short, or whether it fortune to be prorogued, he will take for his wages only a cade and a half barrel of herrings, to be delivered by Christmas."‡ And a century later we find the first record of a corrupt bargain for securing a seat in Parliament.

In 1571 there is an entry that—

"Forasmuch as Thomas Longe, gentleman, returned one of the burgesses for the borough of Westburys in the County of Wiltshire, for this present Parliament, being a very simple man, and of small capacity to serve in that place, hath this day in open court confessed that he gave unto Anthony Garlande, Mayor of the said Town of Westbury, and unto one Watts of the same town, the sum of £4 for that place and room of Burgessship, it is ordered by this House that the said Anthony Garlande and the said Watts shall immediately repay unto the said Thomas Longe the said sum of £4; and also that a fine of £20 be by this House assessed upon the Corporation or inhabitants of the said Town of Westbury, to the Queen's Majesty's use, for their lewd and slanderous attempt."§

It is remarkable that, just about the time when the corruption of electors first showed itself, the system came into vogue

* *Rationales expensas suas in veniendo ad dictum Parliamentum ibidem morando, et exinde ad propria redeundo.* See Co. 4, Inst. 46. Prynne's Notes, p. 29.

† Four shillings a day for every knight, and two shillings for every citizen and burgess. See also 35 Hen. 8, c. 11.

‡ See preface to Serjeant Glanville's Reports, p. 23. *as e*

§ I. Com. Journ, p. 88. Lord Coke adds, that Watts was expelled the House. IV. Inst., 23. See also another case in 1623, reported Glanville, 39.

which has led to more corruption in and out of the walls of St. Stephens than any other—the dealing by Parliament with local and personal schemes by private bill. In Queen Elizabeth's time the business of private bill legislation, then of but recent growth, had rapidly increased. The sturdy queen, as a rebuff to the pliant temper of both Lords and Commons in such matters, is recorded to have disposed of a batch of 67 private bills by peremptorily refusing the royal assent to 48 of them that had passed both Houses.* And at a later period in the history of Parliament—that which immediately succeeded the Restoration—Lord Clarendon describes the application for such special favours at the hands of Parliament as having “exceedingly disquieted and discomposed the House, every man being so much concerned for the interest of his friends or allies that he was more solicitous for the despatch of those than any which related to the king and the public.”†

It was at this time, according to all accounts, that bribery of electors became a systematic abuse, and election expenses increased at a formidable rate. Unprecedented sums were so expended in the election of 1679; and at the Stockbridge election, in 1689, it was publicly proclaimed that any elector might have six guineas for his vote.‡ A candidate for Westminster, six years afterwards, had to disburse £2,000 among the electors, but without success.§

In defiance of all legislative attempts to stop it, bribery increased, and elections came at once to be a regular business for the management of jobbers. For many boroughs there was a stated price; and commercial nabobs with their imported gold forced their way into Parliament, with a view, not to a political career, but to serve merely their own personal ends.||

* See “Continuation of Lord Clarendon's Life,” Vol. II., p. 152, 8vo, Ed.

† See Townsend's “Historical Collections,” p. 49.

‡ See 10 Com. Journ., 287.

§ Macaulay's “History of England,” Vol. IV., p. 615.

|| Davenant's Works, Vol. III., p. 326, 328. May's “Constitutional History,” Vol. I., p. 278.

How this great plague progressed in the last century, and the commercial value of a seat in Parliament, which governed the price of the elector's vote, varied with the amount of general corruption at St. Stephens, has already been too often described to need our dwelling on it here.

The great reform of 1832, which tended to lessen the value of a seat in Parliament as a political venture, effected little in the way of lowering its cost. Though sinecures are dying away, and the rewards for political subserviency are becoming *beautifully less*, the position of M.P. remains of appreciable value. It brings to men of mere wealth a social position they could in vain aspire to before. Not only those who have succeeded in commercial undertakings at home or in the Colonies, but successful adventurers of more questionable pretensions to social esteem or respect are ready to bid high for such advantages. No matter how insignificant a figure the person elected may cut within the House; he must be singularly deficient or wrongheaded to whom the designation of M.P. does not bring great advantages in the world. Though he may not look to offices of honour or profit by political subserviency, he at all events gains *a title*, looking better, and weighing more in the calculation of "Who's Who?" than a knighthood undeserved, or a city baronetcy: and in these days, when grandees are at a good premium for directorships in the many schemes concocted in the purlieus of Capel Court, the sum of £3,000, or £4,000 judiciously laid out in acquiring a seat in Parliament, affords the prospect of a speedy and profitable return.

If the account recently given in the *Spectator* be correct, the joint-stock undertakings are at present very powerfully represented in Parliament—225 railways, 195 financial, assurance, and banking companies, and 185 miscellaneous associations having M.P.'s as directors—more than one-third of the whole House of Commons are thus personally interested in undertakings which now enjoy, or are seeking exclusive privileges and special advantages at the hands of Parliament. It may

be that in every case the high character of honourable members may suffice to refute the notion that there is anything wrong in all this. All that need be said here, is that the facts just referred to not only speak volumes against the system of private bill legislation, but in favour of any change by which a seat in Parliament may be made less dependent on the use and abuse of the *almighty dollar*.

The plague of electoral corruption originating with those to whom the expenditure of money is altogether a secondary consideration, everything that gives money the advantage in the contest tends to aggravate the disease, and the costly ordeal which is now prescribed for curing the evil tends in a great degree to aggravate it.

When a candidate has the fortune to be *per fas aut per nefas* at the head of the poll, and the returning officer declares him duly elected, he can only be unseated by a committee of the House of Commons. The ordeal of an election committee has terrors for all *except those* whose lavish system of expenditure keeps up the system of corruption. An election committee is, in spite of all efforts to reform it, an anomaly, and at once the most costly and unsatisfactory of all our tribunals.

The claim of the House of Commons to alone adjudicate on the validity of the election of its own members is in principle very objectionable. It is, in fact, neither more nor less than the claim of a body of individuals to act as judges in their own case. The right of freely choosing representatives in the British Parliament is one which the electors enjoy by the law of the land. The question whether that right has been legally exercised is in principle one for a purely judicial tribunal, and not for a mere committee of privileges.

By the tenor of the privilege in question, the determining on the validity of elections, belongs to the whole assembly of the House of Commons. Mr. Grenville, who in 1770 effected, by the Act of Parliament which usually bears his name, the first reform of this anomaly, succeeded, when introducing

his bill, in convincing the House of Commons of the evil tendencies of the privilege contended for.

"Instead," he remarked, "of trusting to the merits of their respective causes, the principal dependence of both parties is their private interest among us, and it is scandalously notorious that we are as earnestly canvassed to attend in favour of the opposite sides as if we were wholly self-elective, and not bound to act by the principles of justice, but by the discretionary impulse of our own inclinations; nay, it is well known that in every contested election many members of this House who are ultimately to judge in a kind of judicial capacity between the competitors, enlist themselves as parties in the contention, and take upon themselves the practical management of the very business upon which they should determine with the strictest impartiality."

The claim of the House of Commons to have the exclusive cognisance of election cases is much less founded in reason than the claim by which the abuses of private bill legislation are upheld. In the latter instance there is always some concession to be made deviating from the general law of the land, which though capable of being more justly dealt with under a system of general legislation, comes at present constitutionally within the exclusive province of Parliament. In the instance, however, of the assumed exclusive jurisdiction over election questions, the House of Commons, through its committees, not only sets at defiance the great principle of justice that none shall be judge in his own cause, but does it without excuse; inasmuch as the law being clearly laid down, justice and propriety would suggest any other tribunal to put it in force than one composed of interested judges.

True it is that by the reform of the proceedings on election petitions in Parliament, commenced by the Grenville Act,* and advanced by more recent regulations, great precautions are taken to prevent the election committees being composed of members who are immediately interested in the result of the individual case submitted to them; but so long as there

are no effectual means actually to prevent bribery and corruption, the suspicion will arise, that all members returned to the House of Commons after a contested election are in some way in *pari delicto*, and therefore in the highest degree unfitted to sit in judgment on each other.

If it is possible to believe that the members who compose an election committee are all free from party spirit, there is the slightest security imaginable that those who have the control of the inquiry will not so conduct it as to serve only their own sordid interests. It too often happens that the petitioner is *in consimili casu* with the successful candidate. With absolute power on the part of the committee to set at nought the rules of evidence and the letter and spirit of the law, and almost unfettered discretion on the part of those who conduct the proceedings to suppress facts, to intrigue, to withdraw, and to compromise, there is no security whatever that the finding of an election committee may not be brought about by means as corrupt as the return whose validity is in question.

As the sole aim of the litigating parties is to win the contested seat, every circumstance which does not directly tend to this end is prudently kept from the committee; when the victory has been gained, the victor can afford to be generous; and though the grossest bribery has been proved, the committee who declare an election void on the ground of bribery, are easily induced to add, that there was no evidence that the unseated M.P. was cognisant of the bribery that was practised on his behalf.

Whilst this system continues it must always, of itself, abundantly supply inducements to a class of candidates whose lavish expenditure tends far more to keep up the money value of electors' votes on the polling day, than all the mere party spirit which can be infused into the contest, by the emissaries, or the influence, or the gold of the Carlton or the Reform Clubs.

The penal laws against bribery and corruption are for the most part severe enough. There are large penalties and full

costs for those who will turn informers; but the effect of these penal provisions is unhappily too often, instead of really checking the offence of bribery, merely to encourage extortion. Proceedings for penalties left to the tender mercies of mere informers are threatened in secret, and as secretly compromised. The dread of exposure, of placing in jeopardy the result of an election, and of the costly ordeal of an election petition, tends to prevent the elected candidate from disputing any claim, however exorbitant, which those whose harvest is a general election may please to make, with any semblance of pretence. What candidate is there in our time so happy as to have escaped such inflictions? If rumour speaks truth there are cases where extortionate claims and threats of legal proceedings arising out of an election contest have sprung up long after the election was over, and have remained for years—ay, even during life—a millstone round the neck of the *fortunate* candidate.

These great evils, which the existing law is unable to cure, have engaged the attention of earnest reformers. We have many remedies suggested. Lord Brougham would increase the penalty and make the offence of bribery felony.* Mr. Craven Berkeley annually presses on public attention the ballot as a means of enabling the elector to vote in secret and outwit those who seek to corrupt him. Others advocate the discontinuance of all artificial remedies, and leave the plague of corruption to die by the force of public opinion, and a voluntary combination of honest men from all parties determined to put a stop to it.†

To all these suggestions there are objections of a serious character. Merely to increase the penalties of bribery would not tend to diminish the number of offenders, and experience proves that it would seriously lessen the number of prosecutions. To substitute secret for open voting, it has been over

* See "Journal of Society for Amendment of the Law," Vol. III., p. 115.

† See the able papers of Mr. W. D. Christie and the Rev. F. D. Maurice, printed among the proceedings of the Social Science Association, 1864.

and over again demonstrated, would tend to lower the general character of the constituencies, but not to put an end to bribery or coercion; and simply to trust to public opinion to put an end to bribery would be to rest on a very frail security. Public opinion, unhappily, is not strong enough to put an end to any other kind of offences. How can it be expected to operate with greater power in this particular instance? *It is the law which gives the elective franchise, and it is the law that ought to carry out the principle that elections shall be free. Is it really impossible to legislate effectively for this purpose?

Combination among good men may, however, effect much. If the form of combination suggested by Mr. Christie and Mr. Maurice failed to effect the object aimed at, there is no reason to suppose that combinations on the part of electors, more immediately damaged by the present state of things, and societies established by them on the principle of mutual protection, would be more pernicious in their operation than ordinary trades' unions. If such societies were formed throughout the country for the purpose of enforcing the laws against bribery and corruption, without regard to party, and held out to their subscribing members that they would be indemnified out of the funds of the society against all unfair consequences arising from their just exercise of the elective franchise, the mere fact of the existence of such societies would be more efficacious in stopping bribery and coercion than the provisions of the law itself. We have such friendly societies, on the principle of mutual assurance for indemnity against the visitations of sickness and other calamities. We have societies also for prosecuting offences, and for mutual protection against acts of oppression between employers and employed; what is to prevent such societies being also formed for protection against bribery and coercion—against the oppression of the honest voter by the landlord, the employer, or the creditor, and the detection and punishment of all corrupt practices? A very small pecuniary contribution from each member of such an association would suffice to secure a great gain.

With regard to the actual provisions of the law for suppressing bribery and coercion, cannot more simple means be resorted to with advantage? Cannot the *elector-pest*, like the *rinder-pest*, be stayed by *stamping out from the constituencies those that are actually infected*, or may reasonably be deemed to be predisposed to infection, regulating altogether the transit of money for election purposes, and providing for an effectual revision of the proceedings of every election? The system of registration of voters introduced by the Reform Act of 1832 effected the great improvement on the old system, of requiring the right to vote to be duly investigated and registered before the time of the election. An extension of the powers of the revising barrister as to the purification of the register, and an application of a uniform system of revision also to the poll books, would go farther to put an end to corrupt and irregular practices at elections than all the penalties that could be devised for wrongdoers.

1. Let the conviction of any felony, extortion, or fraud, or of bribery, intimidation, coercion, or corrupt practices of any kind, or of attempts to commit such offences, operate *de facto* as a disfranchisement for a certain period of time; and on due proof of the same, let the offenders' names be struck out of any register and voters' list by the revising barrister.

2. Let the penalties for bribery and corrupt practices be made recoverable before any justice of the peace, and the amount payable be given to the county or borough rates, in aid of the portion of the expenses of the election coming out of such rates; and let those penalties attach not only on the principal offenders, but on everyone who knowingly aided in the perpetration of the offence—the publican who supplied the meat or drink, the go-between that carried the corrupt message or opened the corrupt negotiation.

3. Let a scale of election expenses be settled by some competent authority, large enough to embrace all legitimate disbursements at elections, and regulated according to the

number of electors, the size of the district, &c., and let this be binding on all candidates.

4. Let every candidate be required to appoint an attorney of the courts at Westminster his agent for all purposes at the election, and let all payments and disbursements in any way incident to the election be required to be made through this agent.

5. Let the payment of canvassers under any pretence be declared illegal, and let the name of every person employed in any capacity, with the nature of his employment, and the amount payable to him, be duly entered by the authorised agent.

6. Let it be declared illegal for any candidate, or anyone in his behalf, to hold meetings for the purpose of the election at any tavern or place for sale of refreshment.

7. Instead of the present costly, dilatory, and unsatisfactory mode of reviewing the proceedings at an election, and rectifying an undue return, let us have, *in every case a scrutiny of the poll books on the spot immediately after the election ; and let it be required that all election expenses, and all claims and demands against any candidate, or any other person, in respect of such election, be submitted for examination and allowance by those who conduct the scrutiny.*

8. If within 14 days of the date of the return no notice be given of the same being controverted, let the scrutiny be conducted by the revising barrister, assisted by the returning officer; and if such notice be given, let the revising barrister have also the assistance of the county court judge of the district, and with him form a court. Let the court have all the power and authority of an election committee as to calling all necessary parties before it.

9. Let all expenses of the returning officers, and of holding the scrutiny, come out of the county or borough rates; but let the court have full power to award costs and expenses against any candidate or other person whose conduct shall have caused the same to be incurred.

These suggestions for checking the evils attending our

electoral system are submitted for public consideration in the belief that, both in and out of the legal profession, all right-minded men think that a remedy is now called for.

There are prejudices, no doubt, to be overcome, but these are not of a very formidable character.

The question of *Parliamentary privilege* involved in the suggestions is really a very small one. The jurisdiction of the House of Commons in election cases, by virtue of their privilege, was legally taken away by the Grenville Act of 1770, by which the election committee was constituted a tribunal deriving all its power, authority, and jurisdiction from the general law, notwithstanding all that the sticklers for ancient privilege could urge against its abandonment.*

The prejudices of the members of the legal profession against a proposal to check the corrupt practices at elections can be few. Those who may be professionally engaged in election matters in any stage, can never regret that their engagement on such occasions would, under an improved state of the law, instead of being, as now, of a somewhat questionable character, become one of honour and importance, conducing to the public good.

The honest class of candidates and electors would, under the system here recommended, be effectually protected, and the agents of corruption put to confusion. The competition for seats in Parliament would not be less, but we should have the competition of merit and ability, not, as too often happens now, contests carried on by means of open bribery, unscrupulous coercion, and lawless intimidation.

* See, on this, Lord Campbell's "Lives of the Chancellors," Vol. VI., p. 98.

ART. IV.—ON THE CONSTRUCTION OF SPECIFICATIONS OF PATENTS.—(*Continued.*)

IN a former article attention was drawn to the great importance of an early construction of the specification by the court in all patent causes. And the argument used was one in which while admitting the soundness of the ultimate construction usually arrived at, the ordinary form of proceeding for conducting the preliminary inquiry was objected to as being unduly elaborate and costly.

It is intended in the present article to continue the subject by advertng briefly to some of the more prominent evils in practice resulting from delay in the authoritative construction of specifications. The first evil to be noticed may be said to be the chief, viz., the liability to render the documents ambiguous. It is quite evident that ambiguity of claim and description in specifications, whether arising from carelessness or from design, is a source of great trouble and, if preventible, ought not to be tolerated. And so far as this evil is practically increased by the absence of a salutary check as contemplated by the theory of the law relative to the construction of specifications by the courts, it is an evil which has within it the seeds of reproduction. Every instance of hesitation or indefiniteness in the conduct of the court has a tendency to multiply artificial difficulties for the judges in future cases.

Mr. Hindmarch, in his separate report as one of the commissioners appointed to inquire into the working of the law relating to letters patent for inventions, lays great stress on the evil at present referred to. He says:—

“Specifications of inventions are frequently prepared in such a manner as to occasion great difficulty in construing them, and in ascertaining the nature and extent of the claims of invention which they are intended to make. And from this cause the cost of litigating patent rights is often greatly enhanced. There is too much

reason for believing that specifications are frequently thus prepared with a fraudulent object. A specification ought to define the invention intended to be comprised in a patent so as to enable any person of ordinary skill and intelligence upon reading it to ascertain without difficulty the nature and extent of the right conferred by the patent. If an alleged invention cannot be so described, it is one which (if it deserves to be called an invention) ought not to be made the subject of a patent."

Every invention which is a legitimate subject for a patent can be intelligibly described, and therefore the specification, if duly prepared, can be legally construed. On the other hand, it is true that a specification may be so ambiguous in its terms and in its ostensible description of an invention, as to be incapable of construction according to law. But there is no conceivable case of an invention which might form the subject of a valid patent, and yet be incapable of being described in such a manner as to admit of a legal construction of the specification. Neither is it conceivable that a specification in which an invention, the subject of a valid patent, is accurately defined and described, can be so intricate as to forbid legal construction. These points are necessarily assumed for the sake of brevity; they might be proved did space permit.

Such being the case, the actual state of things adverted to by Mr. Hindmarch, and admitted by all persons of experience to be truly described, requires to be accounted for. One reason for it may be, that comparatively few specifications are presented to the courts for construction, and their defects, therefore, escape general notice, and patentees are thereby naturally led to suppose that similar defects in their documents will run no great risk of detection.

Although much is said about the amount of litigation with reference to patents, it must be remembered that when measured by the number of existing patents, it is small, being, for the most part, confined to patents yielding large profits. This fact supplies incidentally an argument against a preliminary examination of all applications for patents, since it shows that

a large number are eventually found not worth contending about, from which it may be inferred that they would not be worth the expense of the inquiry and the delay in the general business of the Patent Office caused by such inquiry.

Another reason, however, for the existing defects in specifications, is to be found in the apparent remoteness of such a construction of the document in an individual case as shall either limit the invention conclusively to its legitimate scope, or convict the document of fatal insufficiency. Much reliance is placed also on the possibility of getting an adverse construction reversed or modified on appeal. In this manner the principle on which the trial of questions relating to property generally is sought to be protected from any evil consequences due to the possible narrowness of view taken by a single judge or court, is liable to operate injuriously in postponing that definitive construction of the documents relating to patent property in particular which the nature of the case requires. For what is the case of a patent under the aspect of private property? It is only an exclusive right to use an alleged invention, defined and intelligibly described in a specification. If the invention be not defined and described as required by law, or if the invention, being so defined and described, be not new, there is no legal property in it. But the point as to legal property is not decided either way until the specification is construed with authority. By the delay of such construction valid and invalid patents are put on an equal footing, so that both patentees and the public are in turn liable to suffer prejudice from this cause. Assuming that a specification can always be construed so as to determine what is the scope of the alleged patent right, and whether it be sufficiently described, the natural inference (in theory at least) is, that these points ought to be always conclusively determined in the first instance by an authoritative construction of the document.

The difficulty, however, is said to arise in practice. The judge may not be able to understand the science in the document sufficiently to enable him to construe it according to law,

so as to conclude the question as to the validity and extent of the alleged right of exclusive use. To this objection it is replied that every specification can be construed so as either to convict it of fatal ambiguity or to show what invention is alone included in it.

Individual judges, no doubt, find great difficulty in construing specifications, and, it may be, are occasionally inclined to call a document ambiguous when it is not so in reality, from their want of familiarity with the external objects referred to therein. On this point some information may be derived from Sir James Wigram's remarks with reference to the interpretation of wills:—

“A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only, if found to be of uncertain meaning when persons of competent skill and information are unable to do so. Words cannot be ambiguous because they are unintelligible to a man who cannot read; nor can they be ambiguous, merely because the court which is called upon to explain them may be ignorant of a particular fact, art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this be not a just conclusion, it must follow that the question whether a will (specification) is ambiguous, might be dependent, not upon the propriety of the language the testator (patentee) has used, but upon the degree of knowledge, general or even local, which a particular judge might happen to possess; nay, the technical precision and accuracy of a scientific man might occasion his intestacy (might invalidate his patent right), a proposition too absurd for an argument.”

Sir James Wigram adds a conclusion in favour of the admission of extrinsic evidence to give the court the necessary special information. But the objection of difficulty sometimes urged with reference to the construction of specifications extends to the character of the existing means of information as furnished by scientific witnesses. A few words will be said hereafter on the bearing of the delay in the construction

of specifications on this kind of testimony. At present, the point intended to be asserted is, that it is possible (notwithstanding appearances to the contrary) to put an authoritative construction on every specification in the first instance; so as to determine, on the one hand, whether or not the document is fatally ambiguous or insufficient, or, on the other hand, what is the specific invention claimed. And then, assuming this point to be conceded, it is further asserted that the ordinary delay in putting such a construction on specifications affords a practical encouragement to the state of things (as to the preparation of these documents) justly complained of by Mr. Hindmarch.

Another artificial difficulty, due in a great measure to the same cause, is the absence of anything like an adequate check on the introduction into the legal proceedings of a large number of specifications which are irrelevant to the legitimate subject to be tried. The difficulty last referred to is that specifications are, in point of fact, often prepared in such a manner as to give unnecessary trouble in their construction. In consequence of this, they are, according to the existing practice, left open to various interpretations, each suggesting to an opponent of a patent a different line of attack. Then the specifications being all printed, as well as compendious abridgments of many of them, there are abundant facilities for multiplying alleged anticipations of the inventions claimed. It is obvious, that under these circumstances the absence of an authoritative decision as to what is the invention claimed lets into the proceedings a number of specifications which ought to be excluded. And this is an increasing difficulty, as the number of printed specifications is constantly increasing.

Mr. Carpmael has drawn attention to this artificial difficulty in his evidence before the Patent Law Commissioners, as being one of great magnitude, and he has pointed out the infirmity of the ordinary proceedings with reference to notices of objections founded on prior specifications, in their not fixing the precise use that is to be made of the document cited in each case. It is obvious, that if specifications are left open to

different interpretations, it is easy to multiply objections on the score of alleged anticipation by prior specifications, (especially if the particulars of the objections extend only to naming the part or parts of the document relied on), referred to for the purpose.

But a farther difficulty, due in a great measure to the same cause, has reference to the character of scientific evidence. The position of a scientific witness is rendered anomalous by his being required to testify on oath to the novelty, or otherwise, of an invention alleged to be contained in a specification before the document has been construed with authority. Under such circumstances the evidence of the witness must have reference to his own construction of the specification, which may or may not be that adopted by the court. A reflecting witness has an objection to be placed in so uncertain a position, whereby his testimony is exposed to serious misapprehension. It is quite clear, that if much importance is to be given to scientific evidence in any case, its utility and value must depend on a previously accepted notion of what is the invention in question. No one can predicate novelty, or otherwise, of an unknown invention, and, therefore, all testimony must have reference to some particular invention present at the time to the mind of the witness. But the important question is—what is the particular invention present at the same time to the mind of the court?—and this is too often undivulged at the period when the evidence is supplied.

The existence of this state of things is often the explanation to be given of a common experience in patent cases, viz. ; the apparent conflict of scientific evidence as furnished by witnesses of acknowledged ability and integrity. There is often a great difference between the appearance and the reality as respects the scientific opinions expressed on such occasions. Witnesses are required to give their evidence in the form of answers to particular questions addressed to them by professed advocates employed to support conflicting theories, and it is natural that this mode of proceeding should produce an

appearance of difference of opinion beyond the fact. Besides, the previous consultations between witnesses of this class and counsel in preparing a case for trial, have a tendency to impress such witnesses with the idea of the particular construction of the specification suggested by counsel, which would naturally be different on the two different sides. A definite construction, settled with authority, would often have the effect of reconciling apparent contradictions in scientific evidence.

It is obviously difficult also to advise on questions of infringement, unless the construction likely to be put on the specification by the court can be ascertained, or at least conjectured with some approach to accuracy. It is, moreover, difficult to induce inventors to examine into the novelty of their inventions, and to appreciate the importance of accuracy and good faith, when conclusive decisions appear so remote, as to be not worth taking into serious account.

Other artificial difficulties, greatly increased, if not altogether caused, by the ordinary delay of the courts as to the construction of specifications, might be referred to, and cases might be cited in illustration of the points asserted, but the very limited space allotted to the writer for this article precludes any such course.

It is trusted, however, that enough has been said to indicate some of the more prominent artificial difficulties experienced in practice, which might be removed, or, at least, greatly reduced by prompt conclusive decisions by the court, in the first instance, as to the limits of inventions alleged to be new, and sufficiently described in specifications. As respects the first difficulty adverted to, that of obscurity in the language and illustrations commonly used in specifications, prompt conclusive decisions, as a rule of practice, would have the effect of either declaring the documents to be fatally ambiguous, or of limiting the argument and evidence to one particular defined invention in each case; and beyond this, intelligent patentees would soon learn how to avoid much of the obscurity of language and illustration that is now too often found in specifi-

cations. Hence, there would be a clear distinction between valid and invalid patents, and a clear definition of the limits within which alone a patentee could legally assert a patent right against all infringers, which would produce an inevitable conviction of the good policy of preparing specifications with every attention to strict accuracy and completeness. It is obvious that legitimate patentees, as well as the public, would be great gainers by such an improved state of things.

With reference to the second difficulty adverted to, decisions, as suggested, would have the effect of excluding irrelevant specifications from the proceedings, by pointing out distinctly what precise invention was alleged to be new, and if to this were added the practice of requiring distinct notice in all cases of "the precise point or points intended to be proved out of the specifications" produced as alleged anticipations of the invention in question (in the manner urged by Mr. Carpmael), the inquiry on the point of novelty, as affected by prior specifications, would be kept within manageable limits.

And then as regards the difficulty relative to scientific evidence which occasions so much remark, it is obvious that the character of such evidence cannot be tested and properly estimated except on the footing of an accepted definition of the invention referred to. This difficulty presses inconveniently on all parties engaged on a trial—on the scientific witness whose evidence is in danger of being misapprehended, on the cross-examining counsel who is perplexed by statements apparently irreconcilable with facts as he has been led to understand them, and on the judge, who is unable to derive that help which he needs in the translation of the technical language of the specification into common language. But an authorised definition of the invention would form a basis for the scientific evidence, and also a test of its character, both of which are absolutely required in order to render it trustworthy as evidence of opinion for the guidance of the Court.

Other points of difficulty have been slightly adverted to as indicating the uncertainty thrown over the advice of competent

practitioners, and the hazardous practice on the part of inventors, induced by the ordinary delay in the construction of specifications, all which evils might be removed, or, to say the least, greatly mitigated by prompt decisions.

In conclusion, the writer begs to submit the great importance to society of maintaining a belief in the competency of the judges, duly aided, as required, by scientific assessors (in the manner recommended by the Patent Law Commissioners), to construe all specifications definitively in the first instance. And he further submits that real law reform consists essentially in the removal of artificial difficulties.

ART. V.—THE COURTS OF JUSTICE COMMISSION.

IT is now nearly a year since the royal assent was given to the two bills which, after more than a quarter of a century's agitation, created the machinery and the means for rebuilding, on one central and convenient site, our metropolitan law courts and offices. As the works which they authorise are of national importance, the way in which these works are being carried out is quite worthy of national interest; and we should be glad if the following sketch of what has already been done could pass beyond our professional readers, and engage the attention of the general public.

The Building Act provided that the Treasury should have the assistance of a competent commission in carrying out the varied and complicated arrangements involved in a work of such magnitude.

This commission was at once appointed,* and entered upon its duties on the 5th of July last.

* The royal commission is dated June 29, 1865.

Numerous, probably, beyond precedent, it includes at present the Lord Chancellor for the time being, who is its president, the Master of the Rolls, the three Vice-Chancellors, the three Chief Judges of the Common Law Courts, and a puisne judge of each court, the judge of the Admiralty Court, the judge of the Probate and Divorce Court, the Chancellor of the Exchequer, the First Commissioner of Public Works, the Attorney and Solicitor-General, and the Judge Advocate, the Lords Justices, three officers of the Treasury and Board of Works, and representatives of each branch of the profession and of the Corporation of London: The Lords Justices and several other members were added, under a power given by the Commissioners, and the Commissioners are now about forty in number.

Three committees were formed, to which were referred, "the Works"*—"the Legal arrangements," and the question of "Finance and taxation of the suitor." Applications were made to the heads of all the Courts for information as to the accommodation they would require. Sub-committees were formed of the members of the Commission who represent the Bar, the solicitors, and the Inns of Court; and all these committees set to work with energy, to draw up a comprehensive scheme, with an indefatigable secretary, whose whole heart was in his work † and an able architectural clerk (Mr. Burnet). Every available source of information was resorted to. Plans of the best examples of courts and offices, and the opinions of those, both at home and abroad, who had dealt practically with the subject were obtained. No class was disregarded that could by any possibility be affected by the new buildings, or have any legitimate business there. The legal profession, its employés, those directly interested in contentious or non-contentious business, even the spectators were all fairly

* Subsequently made a committee of the whole commission with a sub-committee for considering the question of approaches and access. (Minutes p. 33.)

† It is due to Mr. Field to say, that he has declined to receive any payment for his services which are purely honorary.

considered in every proposed arrangement. The thorough earnestness and sincerity of the commission are shown by the following fact.

At their seventh meeting, held January 15th, applications were received from the Incorporated Law Society, and the Law Amendment Society, asking for copies of the printed minutes of the proceedings of the Commission. They at once passed a resolution, "That the said societies be furnished with copies of such minutes," adding, that the Commission "did not wish to conceal their proceedings from any who take a real interest in them, but desired to receive communications in aid of their duties from all who are able and willing to make the same."* In the spirit of this resolution they have acted throughout. They drew up a number of suggestions for instructions to the competing architects. These were printed and widely circulated for farther suggestions, and communications. In the first instance the secretary sent out 600 circulars to the chief and many of the junior officers of the courts and offices to be accommodated; to all the provincial law societies, to the law societies of Edinburgh and Dublin, to a solicitor in Paris, to another who is English consul at Brussels, to members of the Incorporated Law Society and the Metropolitan Law Society and others. In compliance with answers to these circulars 400 printed copies of the draft were circulated and elicited a great number of valuable suggestions.

The result of all this labour now lies before us in the shape of the revise of the proposed instructions for the competing architects. It is to this document, as developing the scheme for the new building, that we wish to draw public attention. It contains an elaborate, but lucid introductory statement and a series of 66 schedules, showing in detail the accommodation which will be required. So far as outline and configuration of the building go, of course nothing has been done. The architects are to be engaged for that. But the leading prin-

* Minutes, p. 50. . . . † Letter of Secretary. Minutes, p. 71.

ciples upon which the architects must base their designs have been laid down, and these principles have been worked out in detail. The way in which this has been done, shows a command of the whole subject which reflects the highest credit on the Commission and its officers, and quite confirms the Attorney-General's several statements in the House of Commons, that they have been in diligent and most harmonious work ever since their appointment.

"The chief purpose," say the Commissioners, "of the proposed new building is to concentrate the several courts of justice and the offices connected therewith ; and the object of this concentration is, to afford greater facility for the despatch and accurate transaction of the law business for the country.* . . . It is essential that the architect, in preparing his designs for the new building, should keep this purpose prominently in view." *

And this has been the wise foundation of all their scheme. The instructions and suggestions for the architect's guidance deal, first, with the accommodation required : secondly, with the arrangement of the entire building with its accesses and approaches ; and thirdly, with general subjects. The part devoted to the accommodation required, is explanatory of the 66 schedules which show in detail every room that will be wanted ; and the superficial area of each room, from the Lord Chancellor's court, down to messengers' rooms, and rooms for counsels' clerks. It is only by going through these schedules that a just idea is gained of the really imposing nature of the undertaking, and the time and care which the Commission have already bestowed on it.

The site of the new building is familiar to most who have taken any interest in the subject. Its area of seven acres and a half is bounded on the north by Carey Street, on the south by the Strand and a small portion of Picket Street (behind St. Clement Danes church). On the east it has a small street or court, called Bell Yard, which runs parallel with Chancery

* Instructions, par. 2.

Lane; and on the west it has for its boundary the walls of Clements Inn. As the Commissioners worked out the details of the scheme, it became evident that large as the area is, it would probably be necessary to obtain an additional site for the erection of dwellings for the housekeepers, police, fire-brigade, and attendants, to be employed in the vast pile of building, who could not reside in the buildings, and ought to live close at hand.

A block plan accompanies the instructions, showing the additional lands which the Commission have recommended the Government to obtain for this purpose, and for purposes of approaches, and rights of light and air. These additional purchases will, however, be comparatively small, and the architect is expressly directed to "confine himself within the Act of Parliament area for all purposes of buildings."* This area is to be excavated at one level from the Strand to Carey Street, so as "to increase its capabilities of accommodation,"† and upon it a pile of buildings is to be raised, in which will be gathered the following departments of justice.

First Department. The Courts and Offices of Equity. This department includes the Lord Chancellor's Court and rooms for the Lord Justices, the Master of the Rolls, the three Vice-Chancellors, and a spare court, making a series of seven distinct courts, with the necessary rooms attached. To give an instance of the requirements of each of the systems of courts, we will take the schedule of the Master of the Rolls Court. Each schedule, printed on a separate sheet, contains a number and letter to identify it. Then follows, numeratum, each room with its proposed area;‡ whilst columns, referring to the architect's design, show where he has put each room and its dimensions. At the foot are remarks and explanations as to each room, and the architects are requested to send in rough sketch plans and sections, or tracings, attached to each

* Instructions, par. 18.

† Instructions, par 19.

‡ The dimensions are left to the discretion of the architect.

schedule, to facilitate comparison and reference.* The schedule of the courts and offices of the Master of the Rolls contains "The Court," with an area of 1,200 feet superficial, and fourteen subsidiary rooms, occupying a superficial area of 4,060 feet. Each of the other systems of courts has about the same area and number of rooms. Then come the chambers of the Equity Judges, each with its judge's room and retiring room, its chief clerks' rooms and retiring rooms, its junior clerks' rooms, its public waiting rooms, lavatories, and conveniences, and separate rooms for witnesses and married women, and wards of Court, amounting in the whole to ninety-three rooms, for the transaction of equity chamber business. Next follow the offices of the Registrars, which will require no less than sixty-four rooms, the Taxing Master's offices with forty-four rooms, the Accountant-General's office with sixteen rooms, the Record and Writ and Report offices with eleven, the petty bag office with three, the Examiner's office with eight, and the Enrolment office with six. The Lunacy department requires twenty-eight distinct rooms, and the whole of the Equity Courts and offices will comprise, in addition to the seven chief courts, 383 rooms. The Commission, without making any positive stipulation as to the relative position of the different courts, express an opinion that, as a matter of convenience, these Equity Courts would be better placed on the side nearest Lincoln's Inn, and that the Common Law Courts should be nearest to the Temple.†

The Second Department contains the Courts and Offices of Common Law, which are set out in similar detail, and with equal regard to the convenience of every description of persons, from the judge to the juryman, and witness. Each of the three superior courts has the following set of courts and rooms. A Banco court, with a judges' robing room, and three retiring rooms; a room for hearing summonses opening out of the robing room; a waiting room; a jury room; a jury waiting

* Instructions, par. 50.

† Instructions, par. 27.

room; a room for plaintiff's male witnesses, another for plaintiff's female witnesses,* and similar accommodation for the defendants' witnesses.

Second: Two Nisi Prius courts, each to contain a superficial area of 1,376 square feet, and each provided with accommodation for jury and witnesses, similar to that attached to the Banco Court; rooms for counsel and consultations; a room for counsels' clerks, and another for attorneys. In addition to a court for holding exchequer chamber sittings, a spare court is to be provided. Adjoining each other, though not necessarily immediately adjoining the courts, are grouped the three sets of judges' chambers, with their offices and a public hall, common to the three sets. Next come the offices of the masters of the three superior courts, each set comprising twenty-nine rooms, and each containing a library or consultation room. Then follow the three offices of the associates; the Crown office; the offices of the Queen's Remembrancer; the offices of the eight circuit associates, who hitherto have had no official local habitation in town; and the registry of acknowledgments of deeds by married women. For the transaction of the business of this common law department, eleven chief courts, and 311 separate rooms will be required.

The Third Department includes that part of the building devoted to the probate, divorce and matrimonial, admiralty, and ecclesiastical causes. The business of the probate and divorce court alone, will require for its exclusive accommodation 135 rooms. Of these, the strictly judicial business will require only seventeen. The remaining 118 rooms, are devoted to the large administrative business. Of the court of probate, the record keeper's department itself will require thirty-nine rooms for its ordinary business, and farther fire-proof accommodation to the extent of 350,000 cubic feet, for testamentary documents. This accommodation is to be made in the shape of a tower or towers. The wisdom of this plan may at first sight

* Throughout the building separate accommodation is to be provided for female witnesses.

seem doubtful, and recal the warning of the satirist against raising—

“numerosa,
Excelsæ turris tabulata.”

But the request of the Probate Court officers is the result of sound experience, and will bear examination. In the first place—*towers save space*. Unless the wills are placed in towers they would absorb a large and very valuable basement, area. Then, again, a large proportion of the wills stored in these towers will be of a date which renders reference to them comparatively rare; for wills more than twenty years old cease, as a rule, to be referred to. And here we must express a hope that the new courts and offices will not be encumbered with that part of the collection of wills, now at Doctor's Commons, and in the provinces, which have ceased to bear upon the rights of property, and have passed into the domain of history. The new building should not receive or continue to hold wills more than 100 years old. Wills of older date could be stored in the ample recesses of the Record Office, where proper arrangements could easily be made for reference to them by the studious or curious inquirer. The tower or towers will be built in stories, with floors of iron lattice; so that, being warmed from below, the warm air will pass freely up to the top, and keep the collection of documents dry. The wills, we presume, will be arranged in chronological order; beginning with the most recent at the bottom. Of course each tower will be kept in complete isolation from the rest of the building so as to cut off any external fire. From internal fire they will be very safe; for paper—though so inflammable when loose—becomes almost incombustible when tightly packed. Lifts, doubtless, will be constructed for purposes of reference, which will carry inquirers to the papers at any part of the building. Lastly, it must be remembered, that if properly treated, two such towers as are here sketched would add materially to the architectural effect of the building in whatever style it may be built.

The Admiralty court, chambers, and offices, will occupy 53 rooms; an additional court and offices for ecclesiastical admiralty, probate and divorce business will take up 27 rooms.

After these three departments, which occupy 56 schedules, come seven schedules containing:—An Appellate Court (which may be used by the Judicial Committee of the Privy Council) with all its necessary offices; offices for the Attorney and Solicitor-General (Crown officer's rooms); a Bankruptcy Court, chambers, and offices; Land Registry Office; Registry of Judgments affecting Land; Middlesex Registry office; and three board-rooms for Royal Law Commissions, with offices attached. The last (65th) schedule but one requires the architect to provide a general library for all the Bar and the attorneys; Bar robing rooms; arbitration rooms; and rooms for sales of property; rooms for shorthand writers and reporters; proper refreshment rooms, with kitchen, &c.; lavatories; waterclosets; offices for the sale of stamps, cause lists, and stationery; a post-office; a telegraph-office; an inquiry and lost property office; a cloak-room; accommodation for the police force and fire brigade; for ticket-porters, commissionaires, and shoeblacks.

Without taking this schedule, we have counted not far from a thousand courts and rooms. The general accommodation last specified; the rooms required for the probate documents; for the land registry documents and offices, and for the Middlesex Registry, will certainly swell the number to at least eleven hundred. In this great building will be gathered together courts, offices, and chambers, now scattered about London in the oddest manner; the Equity Courts, chambers, and offices, in and about Lincoln's Inn and Chancery Lane; the Common Law courts at Westminster and Guildhall; their chambers and offices in Chancery Lane and the Temple; the Probate and Divorce Court at Westminster; its offices at Doctors' Commons, and so on.

The works thus contemplated in these Instructions are, as Mr. Field points out, larger, by a good deal, than those

originally proposed, and will, of course, require an additional outlay. This will, however, involve no additional taxation of the suitor, for there is yet a surplus of about £50,000 a year (*i. e.* £25,000 from Common Law, and £25,000 from the Probate Court) derived from the existing scale of taxation, beyond the legal charges thrown by law upon the suitor, and exclusive of Chancery suitor's taxation. It is of course quite impossible to calculate what this additional outlay will be until proper estimates have been made from the architect's plans. But it may be safely assumed that the interest on it will be covered by half this surplus taxation; leaving the remaining half to be abolished.

The last schedule requires the architect to design accesses to the building, by means of bridges and subways over and under the Strand at Temple Bar, and over and under Carey Street; by a subway under Chancery Lane, by a covered way for carriages on the east side; by an approach on the west from Clement's Inn,* and by a bridge or subway between the building and the proposed dwellings for the housekeepers, attendants, police, and fire brigade. The Commissioners observe that these accesses should be, as much as possible, accesses to the courts and offices, not public thoroughfares, and that some means must be provided for separating the large traffic to the new building from the ordinary traffic of the streets.† For this purpose subways are required to be contrived through or under the building for general public use. This necessity for combining isolation with concentration, and the means of meeting it, were pointed out in a valuable paper read by Mr. Thomas Webster, Q.C., F.R.S., at the Law Amendment Society, in November last, "On the Site, Approaches, and Arrangement of the Palace of Justice." It contains many admirable practical suggestions, particularly

* It should be observed that the Society of Clements Inn have met the Commissioners in the most liberal spirit, and offered to assist them in their plan of accesses, by allowing an approach to be made through their property.

† Instructions, 37, 38.

those for the due separation from each other of the stream of traffic to the various courts and offices; for the appropriation of distinct accesses, between and within the courts, to the different classes of persons using them, and for the collocation of the different courts and offices. Indeed it is clear that the Commissioners have largely availed themselves of his suggestions and hints.

The subject of approaches is of great importance, and deserves all the care and forethought which have been bestowed upon it. For it should be borne in mind—and this we say in no class interest, but in the interest of the public—that it is the first duty of the Commission to provide for accesses to the new building, and to arrange them so that they will interfere as little as possible with the transaction of the public business for which it is to be constructed. Thoroughfares are very useful things in their proper places, and a good through road between Holborn and the Strand would be a blessing. But it is a public improvement quite beside the business of this Commission; for there could not be a more mischievous mistake than to create one through, or even very near the new courts. The very *genius loci* is stillness and seclusion. As far as mere foot passenger traffic is concerned there can be no harm in providing accommodation for the general public passing between the Thames Embankment and Holborn. But we trust that the Commission which is to be the permanent guardian of the new building will take care that no carriage approach shall be used for through traffic by wagons, drays, and other heavy vehicles. Every approach which may be so used, such as those proposed from the North by the two Turnstiles, should be protected by entrance gates, and be open only to carriages and cabs. Some such arrangement as this should certainly be made with respect to Carey Street, and we quite concur with the view expressed in the Minutes (p. 41), that any arrangement for the purchase of land for the purpose of widening this street should have reference to the preservation of its quietness.

The Commissioners expressly say that the instructions are "intended solely to denote the necessities which have to be satisfied," and that the general provisions such as a central hall, entrances, staircases, the refreshment department, coal and water supply, waterclosets and urinals, are left to the ingenuity of the architects. But on all these heads important general directions are given, having for their object the utility and convenience of the structure, which, as they properly say must supersede "all considerations of architectural effect," so far as the two objects may conflict.* Not that the architectural exterior is by any means a matter of no moment, but the Commissioners evidently have a just confidence that an architect who can design in a masterly way a scheme so vast and intricate as that which they have outlined will be equal to the clothing of such a design in a fitting exterior. It will expand as naturally as the flower from the bud, and its proper development is quite analogous to the operations of nature. Very properly, therefore, do the Commission confine themselves to the practical and the useful, never thinking the smallest detail beneath consideration. Thus they urge the importance of affording "abundant window light," as almost every room will be devoted to purposes of reading or writing, and they suggest the use for this purpose of internal areas lined with glazed tiles. They lay equal stress upon the importance of quiet. There should be no external noises of any kind to disturb the courts. The annoyance and interruption which are constantly occurring in our present courts must be rectified by giving easy, convenient, and independent means of access and intercommunication to all engaged in the cause, by separating the mere spectators from the rest of the court, and giving them, where possible, direct access from the street, and so on. They wish that distinct departments should have entirely distinct accesses, and be so independently planned that each may

* Par. 41.

be shut up and off from the other. The questions of ventilation and acoustics, which are of such essential moment, they also leave, with appropriate suggestions, to the architects (in this instance acting upon the advice of Dr. Percy). Accompanying the instructions are two reports on the subject of "Fire" and "Police," which have been made by Captain Shaw and Sir Richard Mayne, and both of which are of great practical value. The suggestions for providing against fire by Captain Shaw are very sensible and to the point. He urges the desirability of buying all buildings actually adjoining the site, so as to acquire the power of bricking up dangerous windows, and excluding the external risks which are very great in crowded districts. More important still, he insists, is the "internal subdivision of the building, which should be carried to the greatest extent compatible with the purposes for which it is destined," and he strongly advises that "the building should be constructed as ships are now built, in a number of separate divisions, allowing as much freedom throughout as may be required, but containing means of instantaneously cutting off this communication by double iron doors." One important element of safety against fire, which we note in the scheme, is the proposed plan for keeping the dwelling-places of the housekeepers, attendants, police, and firemen in a block quite distinct and cut off from the main building. There is no more fruitful source of fire than the carelessness of those engaged in domestic offices.

No designs of any value could be prepared without a careful previous examination of the existing courts and offices, for which substitutes are to be afforded. This could only be properly done with the aid of some official at each place, who could explain how far the existing accommodation was good, how far it was defective, and how the defects could be obviated in the new building. The Commission, therefore, have prepared a list of the fifty-one existing courts and offices for the use of the competing architects, in which is given the time for inspecting each, and the official who will be able to

give information. The words of the Royal Commission are, that the plans and arrangements should be determined upon by the Treasury, "with the advice and concurrence of" the Commissioners. Acting in complete accord, the Treasury and Commission proceeded to the delicate task of fixing the method and terms of competition, and found three courses open to them. 1. To determine upon the architect beforehand. 2. To leave the competition open. 3. To select a certain number of architects as competitors. The first course they could not take, as Parliament had distinctly set its face against it. The adoption of the second was beset with grave practical difficulties. If every one were allowed to enter the lists as a competitor, every one must be allowed full liberty of inspecting the courts and offices, and their business would thus be seriously interfered with. The Royal Commission already unreasonably taxed with their arduous duties of preparation and supervision, would be overwhelmed by the labour of directing and controlling a long array of architects of all kinds, good, bad, and indifferent, most of whom would only obstruct public business, retard the selection of the architect, and thus delay the beginning and the finishing of this important work. Then, again, there was the lamentable experience of the famous Foreign Office competition, with its 300 competitors, and their interminable designs, as a warning against similar attempts. Whatever may be said as to the theoretical truth of the principle of open competitions, this case offers a striking instance of the difficulty, if not impossibility, of adopting it for large national works. The judges appointed, after a vain attempt to grapple with the business of examining several hundreds of designs, were forced to delegate their duties to two professional architects, who, after a laborious but necessarily hurried examination, came to decisions which were satisfactory to no one, and ended, in what was admitted on all hands, to be a grand "fiasco." Deterred by these difficulties from the second, the Commission and the Treasury agreed to adopt the third or middle course, and on the 19th of

February last the judges of designs* named six architects as competitors.

These were E. M. Barry, A.R.A., P. C. Hardwick, junior, Gilbert Scott, R.A., G. E. Street, A. Waterhouse and Thomas H. Wyatt, Mr. Hardwick and Mr. Wyatt declined the appointment, and Mr. Brandon and Mr. Deane were appointed in their places. The terms upon which the competing architects were to be engaged had been thus fixed by the treasury.† A sum of £800 was to be paid to each of the unsuccessful competitors, and all the competing designs, drawings, models, and descriptions sent in were to be the property of the Government. The successful competitor was to have the superintendence of the work, his fee for which was estimated at about £50,000. But a condition that for the first three years he should undertake no *new* professional work requiring his personal superintendence, without the consent of the treasury, led Mr. Scott and Mr. Barry to withdraw from the competition. These vacancies had been filled by Mr. Garling and Mr. Gibson, and at their Ninth General Meeting the Commission had concurred with the treasury on the expediency of not imposing any restriction on the selected architects' ordinary practice; when on the 22nd of last month, the House of Commons, on the motion of Mr. Bentinck, resolved that it was not expedient that the competition should be limited to six. We feel that the Commission have been hardly used in this business. It was, of course, within the fair scope of the House's duty to indicate by resolution, any modification of the plan of the Commission; but it should have been done before, not after everything had been settled. It was scarcely right that the House should stand by until all the arrangements had been completed, and six architects had been set to work, upon a distinct pledge from the treasury, that their chances should not be less than five to one, and should then interfere to stultify the acts of both bodies, and repudiate their engage-

* Mr. Gladstone, Mr. Cowper, the Lord Chief Justice, the Attorney-General, Mr. Stirling (now Sir Stirling Maxwell).

† Instructions, p. 13.

ments. As we have before observed, the Commission, far from making any secret of their plans, have made them widely known. Their resolution in favour of a competition of six, was come to on January 15,* and any objections to it should certainly have been raised before March 22. As for the change directed by the House, it can be of no great use, and will probably do much mischief by rendering it necessary to extend the time for sending in the designs for several months, if not for another year.

The Treasury, with the assistance of the Commission, have selected six architects of known experience and ability. These six men represent also four other men of greater figure than themselves, who have declined to act, either because they were already too much engaged, or did not care to compete; reasons which certainly render it fortunate that they did not accept the appointment. These six competent men are a manageable number, and they can carry out their designs with the actual personal assistance of the honorary secretary and the architectural clerk, both of whom have gained a practical acquaintance with the details of the scheme which will be thus made available when it would not be possible to do so if the number of competitors were large or unlimited. With all these advantages six designs will be drawn up for the Government, which will become their property. That design which shows the greatest amount of ability will entitle its author to the position of architect. But to quote the words of four of the architects originally selected.†

“It is unreasonable to suppose that any one of the designs submitted, will be actually adopted—such is never the case, either with or without competition, as the designs actually adopted are, or ought to be, not the result of a single impulse, but of the united and studious labours of the architect with his employers; and with the help in such a case as this, of those practically conversant with the actual working of every department, and with every practical detail.”

* Minutes. p. 49.

† Messrs. Scott, Wyatt, Barry, and Waterhouse. Minutes, p. 74.

The final plan would thus be resolved upon, and drawn out as a combination of all these six designs, the best features of each being adopted.

We think that laying aside the principle of open competition as impracticable, the course which has been taken will certainly lead to the development of a comprehensive and consistent design; and we don't see that the addition of one or two more competitors, offers any practical advantage to justify the delay which will, we fear, be caused by the interference of the House of Commons. At all events we trust that the number will not be largely increased.*

ART. VI.—RUSSELL ON CRIMES.

A Treatise on Crimes and Misdemeanours, by Sir Wm. Oldnalt Russell, Knt., Late Chief Justice of Bengal. In three volumes. Fourth Edition, by Charles Sprengel Greaves, Esq., one of Her Majesty's Counsel. London: Stevens & Sons, 26, Bell Yard, Lincoln's Inn; H. Sweet, 3, Chancery Lane; W. Maxwell, 32, Bell Yard, Lincoln's Inn. 1865.

INDICTABLE offences have always been divided into treasons, felonies, and misdemeanours. This classification, though far from being logically accurate, has become so engrafted into our legal history, that writers on our criminal law very properly adhere to it, for the sake of convenience. A book of such importance as the one before us, ought to be a complete treatise on the criminal law of England, not only for the guidance of those who live within the jurisdiction of the courts of Westminster, but also for that of our fellow-subjects in Ireland and the Colonies. On this account, we regret that Mr. Greaves has thought it best to adhere to the plan of the

* Since the above article was put in type, we have been informed that the number of competitors has been raised to twelve, of whom Mr. Gilbert Scott has consented to be one.

author, and to exclude an explanation of the law of treason from this book. It is true that prosecutions for that crime are happily not frequent among us, but we hear on the other hand, of attempts at present to extend a treasonable conspiracy into Canada, and even into England. At all events, no book can be put forward as containing a complete treatise on our criminal law if treason is not included in it. We regret this defect the more, as we are convinced that no one is better qualified than Mr. Greaves to reproduce the learning on this subject, for practical guidance in modern times. Felony is an offence which occasions a total forfeiture of either lands or goods, or both, at common law. These alone constitute the *differentia* of that class of crimes. Usually, however, our old law superadded the punishment of death; and so thoroughly did the notion obtain that felonies were punishable capitally, that if a statute made any new offence felony, the law implied that it should be punished with death, as well as with forfeiture, unless the offender prayed the benefit of clergy. The only definition that can be given of misdemeanours as a class, is that they are indictable offences, punishable by fine or imprisonment, or both, but are not treason or felony. It appears to be scarcely correct to say without some qualification that a misdemeanour is any crime less than felony, when we consider that perjury, which under certain circumstances may in its moral enormity be as bad as any crime in the calendar, is only a misdemeanour. If, however, we were to say that misdemeanours are indictable offences to which the common law attached punishment of a less degree than to treason or felony, the statement would be correct. Misdemeanours have been sometimes termed misprisions, a word that means any considerable misdemeanour which has not a certain name given to it in law. It is said that a misprision is contained in every treason or felony, and that one who is guilty of felony or treason, may be proceeded against for a misprision only, if the king please.

In looking over the pages of this edition of Russell, we are

struck with chapters on offences of which modern practitioners seldom hear. The old common law of crimes, which in so far as it is not affected by statutes, still exists, is too often ignored in modern practice. If facts do not come within the wording of an Act of Parliament, a prosecution is rarely persevered in, and it is only in great extremities that counsel suggest that the evidence adduced proves the commission of an offence at common law. No one, unfortunately, has ever heard of an indictment for embracery, and many a practitioner would not be able to say what it means. Yet the offence of embracery is still committed, and it would be well if the old law upon it were not forgotten, but were carried into effect sometimes. Embracery consists in such practices as tend to affect the administration of justice by improperly working upon the minds of jurors. Any attempt whatsoever to corrupt or influence or instruct a jury in the cause beforehand, or in any way to induce them to be more favourable to the one side than to the other, by money, promises, letters, threats, or persuasions, except only by the strength of the evidence and the arguments of the counsel in open court at the trial of the cause, is an act of embracery. In some remote assize towns, it is the habit of the attorneys, after delivering their briefs, to go round the inns where the jurors are staying, and to discuss with them the merits of their causes over a friendly glass. An offence akin to that of embracery, is the cajoling and spiring away of witnesses. "All who endeavour," we read at page 265, Vol. I., "to stifle the truth and prevent the due execution of justice, are highly punishable; and therefore the dissuading or endeavouring to dissuade a witness from giving evidence against a person indicted, is an offence at common law, though the persuasion should not succeed." The "common barrator," formerly a name of disgrace, seems somehow to escape the meshes of the criminal law in modern times. Though no one now hears of him, it cannot be said that he has ceased to exist; because, with us as with our ancestors, there are common movers and inciters of suits, in courts of record, and

in other courts; and men who spread false calumnies and rumours whereby discord and disquiet grow among neighbours.

Into the question of legal responsibility for crime, Mr. Greaves enters with great minuteness. Without an act of volition human actions cannot be considered as culpable—and where there is no will to commit an offence there is no justice in punishment. Often, with reference to this subject, the old maxim that drunkenness is no excuse for crime, is much misinterpreted. It is perfectly true, that if a man with a knowledge of what he is about, is impelled by the excitement of intoxication, to do an act which in his sober senses he would probably not have committed, the law does not allow him to shelter himself from the results of his crime by pleading his own voluntary drunkenness. But when the character of an act is to be considered, and when a man's intention is to be deduced from what he has done, drunkenness then does often become an excuse for crime, or rather for that which has the appearance of it. A man when intoxicated has not the same apprehension of the consequences of his act as when he is sober. He may miscalculate distance and force, and ignore entirely the presence of danger. If a man, while he is in a state of great drunkenness, knocks another over a sea-wall into the sea, whereby he is drowned, the state of intoxication in which the prisoner was at the time, most materially affects the character of his crime. Mr. Justice Patteson once said, "A person may be so drunk as to be utterly unable to form any intention at all." "If the prisoner," said Jervis, C.J., in a case of attempted suicide, "was so drunk as not to know what she was about, how can you say that she intended to destroy herself?" So drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when intoxicated than when sober.

The second, third, fourth, and fifth books of the work before us, are devoted to an exhaustive discussion of all crimes known to the English law, with the exception only of treason. An analytical criticism of books and chapters, that are in themselves distinct legal treatises on different subjects, would be too great an undertaking for us to attempt with the space at our disposal. We can only therefore, refer to such portions of this important book as may appear to us to be of special interest. The sixth book contains a very excellent summary of the law of evidence, certainly one of the best for all practical purposes that has ever been published. It was originally supplied by the Right Honourable Sir E. Vaughan Williams, and derives additional value from the great care with which Mr. Greaves has digested and noted up all the recent authorities. In reading the sections that treat at great length on confessions and admissions, examinations before the magistrates and depositions, we are struck with the disregard in practice of some of the safeguards with which our old lawyers surrounded the liberty of the subject. The establishment of the county constabulary, as a species of social army, has very much tended to the introduction into England of the continental inquisitorial system with regard to prisoners. The judges take care to check the practice in court—but the police subject prisoners to private examinations, not so much for the purpose of obtaining admissions to be used in court, but for that of knowing where they can get other substantive evidence to use against them.

A bill is now before Parliament which will have the effect, if it passes into a law, of preventing the clerks of magistrates acting as prosecuting attorneys. This measure would correct a great abuse. The clerk, as the adviser of the magistrates, occupies at petty-sessions a judicial position, and it is most unseemly that he should have any pecuniary interest in the decision at which they may arrive. For our own part, we have often been pained at witnessing the zeal of some of these officers. Often that zeal creeps into the depositions—and when an ignorant

witness is in the box, it is easy by the change of one word to vary materially his real meaning. In one case which came under our immediate notice, a prisoner who was accused of one of the gravest crimes known to the law, was asked by the clerk, after the usual caution, if he had anything to say. The prisoner, an ignorant man, shook his head. The magistrate's clerk, who was afterwards prosecuting attorney, returned with the depositions the statement of the prisoner as being, "I have nothing to say in answer to this charge," and the prosecuting counsel at the assizes put it in as an admission of his guilt. The prisoner was acquitted on the merits: but his chance of escape was materially lessened by the verbal expression which the clerk thought proper to give to the shake of the head before the magistrate.

It has been discussed of late whether communications made to a clergyman are, by the English law, privileged. At page 503 we are told—

"The privilege is strictly confined to communications made to counsel, solicitors, and attorneys. No others, however confidential, or whatever be the relation or employment of the party entrusted, are privileged. Therefore all other professional persons, whether physicians, surgeons, or clergymen, are bound to disclose the matters confided to them. Thus, where the prisoner, being a papist, had made a confession before a protestant clergyman of the crime for which he was indicted, that confession was permitted, by Buller, J. to be given in evidence on the trial, and the prisoner was convicted and executed. So, a confession to a popish priest has been held not to be privileged."

In *Reg. v. Hay* (2 F. & F.) Hill, J., committed a Roman Catholic priest for refusing to state from whom he received a stolen watch, which he said he had received in connection with the confessional. But the priest was not asked to disclose anything that had been stated to him in the confessional, and therefore no question arose as to that. Where a witness had taken an oath to a prisoner that he would not reveal what the prisoner should tell him, Patteson, J., said—

"These oaths are very wrong and wicked, but still they are not binding, and every person, except counsel and attorneys, is compellable to reveal what they may have heard ; and counsel and attorneys are only excepted because it is absolutely necessary, for the sake of their clients, that communications to them should be protected."— (Note i., page 503, Vol. III.)

One of the most difficult rules that must be observed in conducting an examination in chief is, that leading questions should not be asked. It is generally stated that a leading question is one which suggests the answer which the examining counsel is anxious to obtain from the witness ; and that questions to which Yes or No may be given by way of answer are leading questions. Best, in his book on evidence, says that the rule on this subject is based on two reasons ; first, on the supposition that the witness has a bias in favour of the party bringing him forward ; secondly, that the party calling a witness, knowing beforehand what he has to say, might question him in such a manner as to extract from him only part of what he knows, or even put a false gloss upon the whole. The following are all the exceptions to this rule, that we have been able to find.

1. For the purpose of identifying persons or things already described by the witness, the person or thing may be pointed out to him, and he may be asked directly if that is the person or thing alluded to by him.

2. Where a witness is called to prove a certain fact and another witness is called by way of contradiction, he may be asked in direct terms whether that fact ever took place.

3. If the witness called appear to show a mind hostile to the party calling him, the judge may in his discretion allow counsel to put leading questions to him.

4. Where witness is not able through physical or mental infirmity, or through the complicated nature of the matter on which he is questioned to answer questions put in the ordinary way, the rule as to leading questions may be relaxed.

5. Questions not material to any point really in issue,

but which are merely introductory, are in general not objected to.

Often this rule is unnecessarily pressed, and with little advantage to either party, but with much loss of time to the court. Lord Ellenborough once said—"I wish that objections to questions as leading might be a little better considered before they are made. In general no objections are more frivolous." In practice the suggestion of Lord Ellenborough has not been much observed, as nothing is more common than to hear counsel make objections to questions as leading without any good reason for doing so.

The question of the competency of a child to give evidence is often placed on the same basis and tested in the same way as that of a witness whose incompetency is owing to defect of religious belief. The child of a Christian is competent to give evidence if capable of distinguishing between good and evil, and if it knows that to say what is false is a sin.

"In *Reg. v. Holmes*, 2 F. & F. 788, Wightman, J., seems to have thought it sufficient to allow a child of six years old to be sworn that, to the question 'Is it a good or bad thing to tell a lie?' answered 'A bad thing.' But the following questions and answers were also put and given. 'Do you say your prayers?'—'Yes.' 'What becomes of a person who tells lies?'—'If he tells lies he will go to the wicked fire,' and the child was then sworn. And Wightman, J., admitted a child of about the same age, who answered the question 'Is it a good or bad thing to tell a lie?' by saying 'It was a bad thing' (note p. 613, Vol. III)."

Following the same principle we once heard Channell, B., simply ask a child if it was wrong to tell a lie, and upon receiving an answer in the affirmative order the child to be sworn. Counsel in the case suggested that the child had not been questioned as to his belief in a future state of rewards and punishments, whereupon the learned judge said that that was not necessary in the case of a child, but touched only the

question of incompetency from defect of religious belief. In order to ascertain what form of oath is binding upon the conscience of the witness, proper questions must be submitted to him before he is sworn. The questions that can be put are these two only. 1. Do you believe in a God who is the avenger of falsehood? 2. What form of oath is binding upon your conscience? (*The Queen's case*, 2 B. & B., 284). It has also been held that if a witness says he is a Christian no further question can be put to him before he is sworn (*R. v. Serva*, 2 C. & Kir., 56). These principles, which are entirely consistent with the advanced state of religious freedom in this country, ought to be respected by counsel. In the leading case of *Omichund v. Barker*, the point decided was that an unbeliever in Christianity, if he believed in a God who was the avenger of falsehood, might take a valid oath. Willes, C. B., in his learned judgment in that case left it open whether it was necessary that the witness should believe that the punishment was extended to a future state. Some of his expressions seem to show that it was his opinion that a witness may take a valid oath if he believed in a God who would avenge falsehood in this world. Unfortunately, however, the broad view taken by this learned judge has been much narrowed by some subsequent decisions. Nevertheless it is possible that the view of the Lord Chief Baron in the principal case would now prevail in our courts. It is to be observed that the questions prescribed in *The Queen's case* leave the matter open, and that the witness is not called upon by either to express his belief in a future state of existence.

The chief value of this edition of "*Russell on Crimes*" is imparted to it by the editorship of Mr. Greaves; and for this work no one at the Bar could present better claims. Some of the most important statutes that have been passed in late years with the view of amending our Criminal Procedure and Law were framed by his own hands. To his learning and skill we are chiefly indebted for 14 & 15 Vict., c. 19, and 14 & 15 Vict., c. 100. Previous to the consolidation of the

Criminal Acts in 1861 he had been engaged for many years as a member of the Statute Law Commission, and during that time it is well known that the labouring oar fell to his share. In his editorship of this book he has done full justice to his eminent attainments and reputation. We have heard it said that the work is too long, and that the cases are cited in it at too great length. But from this fact we deduce one of its chief excellencies. Of late years too much reliance has been placed upon the brief compendiums which are valuable for court reference, but which certainly ought not to be looked to as authorities. In these, important cases are noticed, but as a rule the marginal note is alone copied. Often this note is not warranted by the case itself, and still oftener does it but vaguely touch the principle which lies at the foundation of the judgment. In addition to this, abstract declarations of law have but a very slight hold upon the memory. The details of a case sometimes interest us, and are the means of fixing a principle in the mind. We have in this book a safe and standard treatise on our criminal law. We are glad to see it replace the smaller compendiums on the bench at quarter sessions and at assizes, and also at the Bar table. Its publication will bring us back to principles and to the details of old cases, and will have the effect of making the present generation of students better criminal lawyers than those that sprung up during the time that Archbold and Roscoe held divided sway in our courts.

ART. VII.—ON THE REPORT OF THE CAPITAL PUNISHMENT COMMISSIONERS.

THE Capital Punishment Commission sat a certain number of days, asked and received answers to a great number of questions, obtained letters, reports, and documents of a

very varied character; and, finally, has made a report in which the most notable thing is that the Commissioners could not agree upon the principal matters referred to them for consideration.

With all deference for the opinion of a contemporary upon this subject, we think this is a result neither to be wondered at nor regretted. The propriety of inflicting the punishment of death upon our fellow-creatures—and by the phrase we include the moral right, as well as the social expediency—is far too wide a subject, and fraught with too many sources of disagreement, to be adequately dealt with by a commission.

If, indeed, the commission had unanimously reported either in favour of or adversely to the continuance of capital punishment, we doubt very much whether such a report would have been at all more likely to settle the question than will the agreement by the Commissioners that they differ in opinion. Nevertheless, the evidence collected is valuable; and, though it may seem a paradox to say so, some of it is the more valuable since its utter worthlessness is admitted by those who have put it forward.

Thus we have a report from the Bureau Fédéral de Statistique at Bern, that Canton Freiburg had abolished capital punishment without any disadvantage to the security of life.

This, of course, is made much of by the advocates for the abolition of capital punishment. But, behold, Canton Freiburg itself intervenes, and reports its own dissatisfaction. It has tried the experiment, and, in the judgment of those most interested in the success of it, the experiment has failed—so signally failed, that there is an agitation to return to the former law. Upon this, a correspondence ensues; and the result is an admission by the Bureau Fédéral de Statistique at Bern, that the returns prove exactly the reverse of what they had been wanted to prove, but, of course, with the proviso that both departments had been perfectly right. The letter from the statistical office at Berne is so instructive that we give it in extenso:—

Bureau Fédéral de Statistique,
Bern, 16 February, 1865.

DEAR SIR,

In a letter dated from the 9th instant, Mr. William Tallack writes our department to give you further explanations in relation to a discrepancy existing between the statement of the department and of the Canton Freiburg, with respect to the statistical consequences of the abolition of punishment of death in that canton, (1848).

After having ordered a new examination, a statistical abstract of the official court of law lists of the Canton Freiburg, in the 15 years before and the 15 years after the abolition of capital punishment lies before us—a statement of which a copy is at your disposal. This statement confirms exactly the first account of the department.

“That crimes against life and health have not increased relatively (to the increasing of population) in the 15 years after abolition of capital punishment.”

Nevertheless, the statement of Canton Freiburg is exact to crimes against life having, indeed, increased in number above the proportion of increasing population, as you can see from the following tabula :—

Crimes in general in the Canton Freiburg :—

From 1833—1847	-	-	984 by 1,023 persons.
„ 1848—1862	-	-	1,091 by 1,135 „
Population of 1831	-	-	86,169
„ 1850	-	-	99,805
„ 1860	-	-	105,523.

Crimes against life and health—

1833—1845	-	-	-	-	169
1848—1862	-	-	-	-	139

Crimes against life—

1833—1847	-	-	-	-	19
1848—1862	-	-	-	-	45

Of the last : kindsmard (infanticide) has increased from 8 to 15.

Tootschlag (meurtre) 5 to 15.

Mard (assassinat) 1 to 5.

Notwithstanding you would be mistaken if you might attribute this increase to the abolition of capital punishment, as it has been merely accidental, Canton Freiburg being a very small canton. The third

part of the criminals being foreigners to the canton, this example cannot be of any prejudice to the question.

I remain, dear Sir,

Yours, most respectfully,

DUBS.

Chief of the Department of the Interior.

James Henry Patteson, Esq.,

Secretary of Her Majesty's Royal Commission
on Capital Punishment.

Thus two exactly opposite results are justly and logically deducible from the same figures, and both conclusions, although contradictory, are perfectly right—a most comfortable and satisfactory conclusion.

Nor is this the only instructive lesson to be learned from this excellent volume. Mr. Bright appears to attach great importance to the history of Tuscany, and the alteration of its jurisprudence under Leopold I.; here the history is faithfully stated thus:—

Capital punishment abolished in 1786

Restored in 1790

It is added, indeed, that the restoration was the result of “the fears” of timorous ministers who re-established the ancient house and repudiated the doctrine of free trade of the same Leopold.

Extended in 1795

This continued till 1816

When, says the report, “violent robberies, extortions, and murders were frequent,” and from that time a law inflicting capital punishment was in force from that epoch till 1847, when capital punishment was abolished, and finally re-established in 1852.

Now it may or may not be true that “fatal circumstances which troubled the normal state of society caused it (capital punishment) to be reinstated only as an exception,” but to quote the example of Tuscany—“and we observe it is the

example relied on as an example of the success of the experiment" is simply ridiculous. Furthermore, we must protest against the liberties taken with history and arithmetic. Let our readers refer to question 1983—where Mr. J. F. Stephens is cross-examined in the popular sense—that is, examined in a cross manner by Mr. Bright. With the historical report before us, which we have quoted above, it is a little astonishing to find, that for the most part of 80 years capital punishment has been abolished in Tuscany—but if that fact were established we should ask what was the population of Tuscany? What was its extent? Mr. Bright would probably make these inquiries himself if he were discussing the Reform Bill—why not in such an inquiry as this? But, as if that no element of weakness should be wanting, we read in the very same report, as applicable to Tuscany, and under the hand of M. Vacca, Minister of Grace and Justice—

"In order to supply the information asked for, I have had recourse to the President of the Court of Cassation, at Florence, since one of the pernicious effects of the (so to call it) autonomy which remains in Tuscany is the preservation also of the internal regulations for the transaction of business; among others, that of abstaining from sending periodical statistics to the ministry, as is done by all other judicial authorities.

"I have also been obliged to remark with disapprobation that in Tuscany no exact statistical annotations are established, and for that reason also in this matter of capital punishment I have not been able to obtain an exact prospectus of increase and decrease of crime, but only a table of some few cases of homicide in which the author has been discovered or prosecuted, whilst in other cases no record has been kept."

Now, our readers will observe this is no example related by us with the intention of undervaluing the force and magnitude of the experiment, but the favourite specimen upon which Mr. Stephens was examined in the manner we have pointed out.

We have said that the question is too wide for a commission

to deal with; we say, also, that the question is not one upon which lawyers, however eminent, have any special knowledge that would justify them in dogmatising. They cannot judge better than other men what punishment deters and what does not. They may by their practice know more facts relevant to the question, but given the same facts before two men, one a lawyer and one not, we know no reason why the layman should not form as sound a judgment as the lawyer.

This is, perhaps, the most suitable place at which to consider the influence of capital punishment in deterring persons from the commission of murder.

Into the abstract lawfulness of the institution it is almost superfluous to inquire. If it cannot be said to be so plainly enjoined as to create the obligation of inflicting it in cases of murder, it certainly is not condemned either by authority or by reason. If we admit, as we must, that for the practical management of the world we are entitled to risk death ourselves, to make others risk it, and, as in warfare, sometimes to inflict it, there is no denying that we may lawfully deal with it by means of our criminal jurisprudence. The same reasoning, drawn from the necessity of managing human affairs by general rules and in a rough practical way, applies to the argument that we must not inflict the punishment of death because it can never be recalled or compensated in case it should appear not to have been deserved. We are always liable to do and to suffer injustice which cannot be repaired. Risk is a condition of human life. It involves the chance of passing an erroneous sentence of penal servitude which may not be proved erroneous until the convict is dead, as well as the passing of a capital sentence upon a man whose innocence we may discover the day after he has been executed. It exists and is incurred deliberately in numberless situations. The case of capital punishment is therefore not logically separable from other cases. In one and all the only question is whether society and morality gain or lose by our braving the danger of making a mistake. We are thus led directly to

try the whole issue by considering whether people are more frightened by the idea of being hanged or by that of being perpetually imprisoned.

Herein we are compelled to proceed deductively. The experiment of abolishing the death penalty for murder has not been tried on any scale or under any conditions which could make it instructive. The argument that convictions would follow murder more surely if the consequences of their decision were made less awful to jurymen rests on two fallacies. In the first place, there is an error in fact, for there is really no great difficulty in obtaining a verdict of wilful murder when the evidence is such as to justify positive affirmative belief of the defendant's guilt. Few undoubted murderers escape receiving their proper sentence in court, though in two recent and exceptional cases fortune and ingenuity may have preserved them afterwards. If juries are more scrupulous in deciding upon capital charges it is only that the momentous nature of the issue renders them as careful for once as they ought to be always. The second fallacy consists in an assumption that jurymen on entering the box lay down their natural tendency to compare the crime with its punishment. No doubt, when sheepstealing or forgery might send an offender to the gallows, men were slow to convict their fellow men of an act which was disproportionately punished. Human instinct revolted at the prospect, and instead of merely requiring sufficient evidence on which to convict, juries may even have been anxious in seeking an excuse for acquittal. But it does not follow that the same inclination would obtain in cases of murder; the tendency is rather to proceed as if blood could only be wiped out by blood.

In the absence of reliable experience we are driven to what may be called a theory touching the influence which the fear of death may exercise as compared with that exercised by the fear of any secondary punishment. But if the consideration be theoretical as regards the particular question under discussion, it is in other respects perfectly practical. It rests

on the most familiar and certain of all knowledge; on knowledge of our own feelings, and of what we cannot help observing to be the feeling of all around us. "Skin for skin. Yea, all that a man hath will he give for his life," is continually proved to be a truth. Bacon may have asserted that "revenge triumphs over the fear of death," and that "grief flieth to it," but he certainly never knew that it would have less effect than any specified minor evil in deterring persons from any forbidden course of action, though he saw that certain passions will sometimes bring those possessed by them to the most desperate risk, he would undoubtedly have endorsed the words of his great contemporary—deeper even than himself in knowledge of human nature.

"The weariest and most loathed worldly life,
That age, ache, penury, and imprisonment
Can lay on nature, is a paradise
To what we fear of death—"

express a fact which is daily illustrated. We know that, whether from religious awe or superstitious dread of the unknown, or from an instinct common to all forms of animal life, men will struggle through pain and want, will wish to live though bereft of every friend, will nerve themselves to undergo fearful surgical operations, will endure all known ills, rather than face that one ill which is unknown, of which no man can speak from experience, and over which there broods the horror of great darkness. If it were not so, the proportion of those who terminate a joyless existence by their own hands would be far larger than it is. The act, too, would be regarded differently. The common verdict of "temporary insanity" may spring partly from a reluctance to outrage the feelings of surviving relatives by the horrid circumstances of *felo de se*. But it also represents in a great measure the general sense that all the principles of human feeling must be overturned before death can be willingly incurred. When it is incurred voluntarily and deliberately, and in a good cause,

we pay almost divine honours to the memory of those whose feeling of duty has achieved so vast a conquest over the weakness of humanity.

Compared with the fear of death the fear of perpetual imprisonment must be almost ineffective. The things to be compared here are not two sorts of suffering, but the influence which the prospect of each exercises. Grant that the days of a life-long imprisonment, if added up, would show a larger sum of misery than that endured by the culprit who suffers death at a month's warning. It is obvious that the former case can only be appreciated by those who have endured it, or a considerable part of it. Its essence must lie in the monotonous repetition of solitude and restraint, and can hardly be grasped by the imagination. But to be hanged, and hanged publicly, is a terror which any one can understand without effort. It is a defined and concentrated idea which the ordinary mind grasps easily. There is no need to project one's thought into the future, or to say "How should I feel after a year?" and "How after five years?" The dread is almost tangible. And this is evaded in a great measure by its familiarity. We understand what we have always studied, more or less. No one who is not likely to be prosecuted ever stops to think about the pain of imprisonment. But throughout life death stands before us as a thing to be avoided. It is a danger which the mind associates instinctively with almost every human act. It has all seasons for its own. It mixes alike with our labours and our pleasures, and though familiarity may harden us against particular modes of incurring mortal danger, it does not strip mortality itself of terror; on the contrary, it makes the dread more appreciable, and even old age, with all its visible decay, rather confirms than diminishes the fear of the ultimate inevitable defeat in our life-long struggle. Death which comes a week sooner than is necessary seems premature to the sufferer, and to have lived that week would have been to achieve a victory. This tendency of mortal fear to rush like the atmosphere into every crevice of life can

hardly be too strongly insisted on in the present inquiry. For besides educating all sorts of men to feel its bitterness, it arms the State with a power indispensable to her ultimate authority. As there is in general no situation so dreary that life loses all its charms, so even in prison culprits cling to life and are amenable in consequence. They know that resistance would involve them in a contest which would either end in their submission or in being hanged for killing one of their custodians. On this account alone we could ill afford to throw away the weapon which the universal reluctance to die enables us to keep in reserve. But, after all, the general aspect of this influence is much the more important. It is a great security for all that the State should hold within her hands that fate which the most brutal learn to shudder at, and which the most acute minds cannot thoroughly distinguish from the idea of animal destruction. Nor do we doubt, as a matter of speculation, that the public association of capital punishment and murder causes the wickedness of the crime to be more thoroughly felt than it would otherwise be. All who can grasp the ideas of comparative guilt and comparative punishment must be impressed by the coupling of death with death. It is this which constitutes the value of public executions, considered as a deterrent influence and compared with private executions. The bulk of the crowd around the gallows are probably very brutal persons. Indeed, some prison official has said that every murderer he ever knew had seen some other murderer hanged. The remark may be well founded and general, though it might as well have been made of any sight which is only pleasure to coarse tastes. But it goes no way towards showing that public executions are inefficient. The persons whom it is sought to influence are not a crowd, but the nation, into which the crowd is immediately absorbed. Every spectator of an execution relates his experience, and every one, as he does so, preaches unconsciously on the awful text, "Whoso sheddeth man's blood by man shall his blood be shed."

That it may not be shed too profusely, either by the hand

of the assassin or that of the public executioner, will always be the aim of a wise as well as of a merciful government; but there is the mercy that murders as well as the severity, and a poet has said of Robespierre—

“Once, as if sick of blood upon his brow,
He fled the judgment seat, lest there his breath
Should haply doom some criminal to death.”

And history has told us what came of his extravagant sensibility. If the Commission had confined itself to “agreeing to differ,” its labours would have been thrown away, and, at all events, it would have done no mischief, but, unfortunately, the temptation to justify their own existence was too strong upon them, and they recommend a verbal alteration in the law as to murder, but upon this verbal alteration important consequences are to attach. We are to have murder in the first degree as well as murder in the second degree. The first is to be capital, the second is not. Now we fear we are as little in favour of the report upon this subject as we are in favour of Mr. Fitzjames Stephen’s new definition of murder, which that learned and very able gentleman, in a pamphlet recently published, considers will solve all the difficulties incident to administering justice according to certain fixed rules. Human language never can be used with sufficient precision to exclude the possibility of embracing by generality words differing widely in the degree of moral delinquency which they involve. We do not believe it is possible, by the most careful and deliberate consideration, so to frame your language as to adapt it to the infinite variety of human circumstances, nor do we think it desirable if it were possible. Take the ordinary case of killing in a quarrel or in hot blood upon provocation, would it be desirable to have marked out with the precision of a chemist weighing out his drugs, what circumstances of provocation, and how many of them, should reduce killing from murder to manslaughter? Where is the supposed mischief of leaving it to a tribunal to determine in each particular case

the principle of the law being clear enough? Now Sir Michael Foster, in a treatise to which Mr. Stephen hardly does justice, has described the principle upon which the question of murder or manslaughter is to turn, in words which seem to us to require no commentary. In speaking of the malice aforethought, which is a necessary ingredient of murder, Sir M. Foster says—

“When the law maketh use of the term malice aforethought as descriptive of the crime of murder, it is not to be understood in that narrow restrained sense, to which the modern use of the word malice is apt to lead one, a principle of malevolence to particulars; for the law by the term malice in this instance meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant, spirit.”

“In the same latitude are the words malice aforethought to be understood in the statutes which oust clergy in the case of wilful murder. The *malus animus*, which is to be collected from all circumstances, and of which, as I before said, the court and not the jury is to judge, is what bringeth the offence within the denomination of wilful, malicious murder, whatever might be the immediate motive to it; whether it be done, as the old writers express themselves, “*Ira vel odio, vel causâ lucri*,” or from any other wicked or mischievous incentive. And I believe most, if not all the cases, which in our books are ranged under the head of implied malice, will, if carefully adverted to, be found to turn upon this single point; that the fact hath been attended with such circumstances as carry in them plain indications of a heart regardless of social duty, and fatally bent upon mischief.

If an action, unlawful in itself, be done deliberately, and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of fact, and to be collected from circumstances, and the act was done heedlessly and incau-

tiously, it will be manslaughter ; not accidental death, because the act upon which death ensued was unlawful.

And it ought to be remembered that in all other cases of homicide upon slight provocation, if it may be reasonably collected from the weapon made use of, or from any other circumstance, that the party intended to kill or to do some great bodily harm, such homicide will be murder. The mischief done is irreparable, and the outrage is considered as flowing rather from brutal rage or diabolical malignity than from human frailty ; and it is to human frailty, and to that alone, the law indulgeth in every case of felonious homicide." We think, besides being an authoritative exposition of the law, this is excellent good sense. Guided by such a criterion as Foster points out, what tribunal could be better adapted than a judge and a jury—the one to expound the law, and the other to find the fact, whether in each particular case a man has been guilty of murder? Mr. Stephen wants a vigorous inflexible verbal definition. The Commissioners, in effect, wish to remit a question of law to the jury.

Now observe how Mr. Stephen deals with the subject—

"1. Homicide is either accidental, or justifiable, or criminal. Accidental and justifiable homicide are sufficiently ascertained by the law as it stands.

"2. Criminal homicide is either murder or manslaughter.

"3. Murder is criminal homicide committed without provocation, and either with an intention to kill or with an intention to inflict bodily injury or violence likely to cause death, coupled with indifference whether death is caused or not.

"4. Manslaughter is criminal homicide committed without either of these intentions, or with either of these intentions, but under provocation.

"5. Provocation is conduct likely to cause uncontrollable passion in an ordinary man. Acts are said to be done 'under provocation' only if the person committing them is, in fact, thrown by them into an uncontrollable passion, and does the act while so deprived of self-control."

The reader will observe the words, uncontrollable passion, introduced into Mr. Stephen's definition ; " uncontrollable passion " itself requires definition.

Is the passion to be the passion of an ordinary man, and the provocation such that an ordinary man could not resist the temptation to kill ? If the amount of temptation to kill, and the tendency of ordinary men to yield to such a sad temptation, are to be elements in the consideration here, we have an alteration of the law, with a vengeance. If, on the other hand, Mr. Stephen means that such provocation only is pointed to as would provoke men who are ordinary in respect of their observance of moral law and social duties, his definition is an effort—and, we think, an unsuccessful effort—to fasten by the iron framework of a definition the spirit and vigour with which Foster describes a principle applicable to all circumstances, but incapable of being rendered into one sentence of definition. It is remarkable that in looking over foreign codes the distinction between murder and manslaughter is one which is arrived at by various modes of speech, varying in expression, but really pointing to the substance of Foster's description.

(To be continued.)

See notice of Mr. Fitzjames Stephen's Pamphlet—post Ed.

Notices of New Books.

[** It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance require it.]

Britton. Edited, with Translation, by F. M. Nichols, M.A., of Lincoln's Inn, Barrister-at-Law; formerly of Wadham College. Oxford: at the Clarendon Press. London: Macmillan & Co.

EVERYONE who is interested in the early history of our law must be deeply indebted to Mr. Nichols for the admirable translation of Britton which he has just presented to the public. And apart from the immense labour and research bestowed by the learned author upon the book itself, an additional value is given to it by a most interesting introduction.

Really to appreciate the value of such a translation as this we must remember that it is often necessary for the practical lawyer to trace out the origin of many of our old statutes, which have now become part of the common law, and the difficulty in doing so was great indeed, and to many insurmountable, when it had to be collected from books like Britton, which was written in the reign of Edward I., and in a language which has been commonly called Norman-French, but was in reality a corruption of the language which in the 13th century was common to Northern France and to the higher classes of England.

The principal characteristics of this juridical French, says the learned author, were not those of a provincial dialect; they were simply a very limited vocabulary, and a complete degradation of all forms of inflection.

The attention of the legislature and the public has been of late particularly drawn to the necessity of some sort of codification of our laws. Much has been said upon the subject, and many a scheme has been suggested, and to those who still feel an interest in the question this book will be of especial interest, because in Britton we find the earliest attempt at a project of this kind, to which we shall presently refer. The origin of this ancient law treatise is involved in considerable obscurity, and it has long been a question among antiquaries from what source it derived the name by which for centuries it has been known. It was formerly the received opinion that it was the work of John Britton or Le Breton, Bishop of Hereford, who died in 1275, but Mr. Nichols gives very strong

reasons for rejecting the authorship of the bishop. Judging from the age of other treatises as well as from the internal evidence of the book itself, which refers to statutes passed subsequent to the death of the bishop, Mr. Nichols would seem to be correct in fixing the year 1291 as an approximate date for its origin.

There seems no doubt that the book was written in the reign of Edward I., and it has been asserted that he conceived the design of reducing the laws of England to certainty by a written exposition, and that for this purpose he composed, with the assistance of some of the judges, a book of laws. This assertion has been made upon the authority of a distinguished judge, Sir John Prisot, who presided in the Court of Common Pleas in the reign of Henry VI., more than a century after the death of Edward I. What the judge's source of knowledge was, whether it was the tradition of Westminster Hall, or his own conclusion from the contents of the then existing treatises, which had their origin in the time of Edward I., it is impossible to say, but there seems little doubt that the book alluded to as having been written by Edward I. was that known as Britton. Mr. Nichols seems to come to the conclusion that, if there were any materials to aid the search, the author would be found among the clerks employed in the legal service of the Crown; and he says, "This treatise bears upon the face of it an assumption of royal origin. It claims in its opening words to be the immediate work of the king, and the same pretension is kept continually before the reader, the established doctrines of the common law and the practice of the royal courts being enunciated throughout as resulting directly from the will of the author. The form thus impressed upon the book is peculiar to it among the English treatises, and it is difficult to suppose that a work would be prepared or published in such a form, at the period to which this book belongs, without express authority." We also learn from the introduction that the age in which Britton was produced was peculiarly active in the cultivation of the science of jurisprudence. Edward I. did not stand alone in his praiseworthy attempts to reduce the confused mass of laws which he found existing into some sort of system. Most of the enlightened sovereigns in other countries of Europe had already directed their personal efforts to effect the same object. Among the most illustrious examples mentioned are the two works by Alphonso X., King of Castile, the father-in-law of Edward I., which were called "*Las Sieto Partidas Fuero Real*," and the code of Magnus VII. of Norway (surnamed *Laga-later*, or the law reformer); this latter is written throughout, like Britton, in the king's name.

The second part of the introduction treats of the relation of Britton to earlier and contemporary treatises.

At the time when Britton was written, the great work on jurisprudence then in existence was Bracton, one of the ablest and fullest treatises which this country has ever produced; but its great length and its want of system interfered much with its general usefulness. Hence arose the necessity for a comprehensive treatise upon the law as then administered in the royal courts, which should include in a

more compendious form the most useful portions of Bracton. Three treatises were written to supply this want. Fleta, Britton, and a Latin Abridgment of Bracton; of these three, Britton alone came into general use.

Mr. Nichols here gives us what may be considered a satisfactory origin of the name of Britton. "We owe to the ingenuity of Selden a conjecture respecting the origin of the name of Britton, which, if adopted, dispenses with the necessity of our seeking for an author bearing the same name as the book. After observing that the surname of Henry de Bracton, the reputed author of the treatise known by his name, was sometimes written Britton, Briton, and Breton; he states his opinion, that the compendium of law called Britton, (which he elsewhere describes as the royal abridgment of Bracton, increased by the addition of some subsequent statutes) took its name from the author out of whose work, in the king's name and by the king's command, it was composed." That the name of Bracton presents no obstacle to this theory is clear from the way in which the word is spelt in various MSS.; he also adds that "modern examples might be cited to show how a great author may become so identified with the subject he has successfully appropriated that his name may be attached to books of a later time founded upon his own work, in spite of a rearrangement of his materials and of the addition in a large portion of the labours of others."

The third portion of the introduction treats of the character, method, and arrangement of the work.

Britton, as we have before said, was written in Norman-French, and its authority continued for several centuries; but it would seem, however, that towards the end of the 15th century the reputation of the more ancient treatises was in a great measure obscured by later works; for instance, Littleton's "Treatise on Tenures" at that time had obtained a great reputation, and the abridgment of the decided cases collected in the year books by Fitzherbert and Brooke, were relied upon in practice rather than the older works, as showing how the law had been altered by usage, legislation, and judicial decisions. But still the older authors were not entirely superseded. Lord Coke has incorporated considerable passages from Britton, and upon this subject Mr. Nichols says, "as Britton was the first text book written in French, so Coke's Institutes was the first important work upon our law composed in the English language. The great authority of his name, the vastness of his learning, and his familiar knowledge of the original materials of our law—a knowledge so difficult of acquisition, and in which no one in later times could fairly hope to rival him—have so accustomed his successors to depend upon his works for information as to our older law, that in modern times it has been unusual to recur to the sources from which his learning was derived, and our ancient writers have been suffered to throw only that amount of light upon our jurisprudence which is reflected from them by the pages of Coke. The repulsive form in which alone our earlier authors have been accessible has contributed to confine the researches of the student, and for the

practical purposes of legal discussion it has been found a convenient rule to limit a citation of early authorities to those which appear under the sanction of the great commentator. It is not, however, to be expected that in the vast aggregation of authorities of all ages brought together by Coke, the true features of the jurisprudence of a more remote period can be discerned, and the student who desires to know the real nature of the laws expounded by Glanvill, Bracton, and Britton must have recourse to the original sources, and will frequently find it necessary to correct an erroneous impression derived from the confused information of later writers." To enable the law student or practical lawyer to seek these original sources with ease and comfort, Mr. Nichols has with great labour and research produced a translation of this valuable work, which reflects great credit upon his learning and industry.

The Toxicologist's Guide ; a new Manual on Poisons. By John Horsley, F.C.S., Analytical Chemist, Cheltenham. London : Longmans, Green & Co., 1866.

THE author claims in this little index of chemical tests to give the best rules (*post mortem* or otherwise) for the detection of poison in the human economy ; as he says, " reference to larger works in cases of emergency is often attended with inconvenience and disappointment." This may be true, but in cases of urgency no mere book-knowledge can be depended on, and without real practical efficiency even Mr. Horsley's Guide will not supply sure means for the detection of poison. If, indeed, a person come to the investigation without the elementary knowledge here set forth, he is evidently totally unfitted for the most important and responsible office of a toxicologist. But can it be said that with all this book contains he could be deemed complete? Mr. Horsley lays claim to the following as original tests : for morphia, the use of the ferridcyanide of potassium, the mixed liquids after a few hours becoming cherry-red. " A hot acetic solution of morphia, mixed with a few drops of nitrate of silver, reduces it to a metallic state, and on filtering the liquor the blood-red of morphia is developed on the addition of nitric acid. By this it is distinguished from every other alkaloid, and 1-200th of a grain may be thus detected. For atropia, the use of chloride of gold in about half an hour produces yellow crystals in the form of rhomboidal plates. For arsenic, the precipitated sulphide is mixed with double its weight of reduced silver, applying heat, and then the arsenious acid collects in the upper part of the tube—or 3 parts of oxide of copper, or 2 parts of oxide of tin (putty powder) may be used for the same purpose. For veratria an acetic solution heated with chloride of tin and evaporated to dryness, becomes of a blood-red colour." According to our author 1-96,000 of a grain of real prussic acid may be detected by the nitrate of silver test. Strychnine, 1-100,000, may be identified, although Mr. Horsley says that he has himself, by the use of red prussiate of potass detected 1-300,000 part as against 1-10,000 by the use of bichromate ; 1-1,000 of a grain of aconitine caused a tingling

sensation in the throat, and 1-300 part poisoned a small bird. Reinsch's test, in the hands of Mr. Horsley, can detect 1-75,000 of a grain of antimony, and 1-500,000 of a grain of arsenic!! (This against Professor Taylor, who puts it down at 1-200 of a grain. The nitrate of silver showed 1-150,000 of a grain of arsenic acid, and sulphate of copper 1-50,000 of a grain of arsenious acid. For copper, prussiate of potass will detect 1-60,000 part of a grain of the metal—and chromate of potass 1-100,000 of a grain of lead—iodine of potass 1-10,000. What does the author mean by the following sentence? When speaking of boiling the suspected solution with bright copper, he says—"On continuing the ebullition arsenic may be deposited thereon in a metallic form, which is considerably heightened by rubbing, after withdrawal from the liquid."

This little book, which is also illustrated with a few drawings of crystals, may be valuable to students commencing a course of practical chemistry and toxicology.

Equity in the County Court. A Treatise on the Equitable Jurisdiction conferred upon the County Courts by Statute 28 and 29 Vict., c. 99. By Henry F. Gibbons, LL.B., Cantab, Barrister-at-Law, Midland Circuit; and William C. Harvey, B.A., Cantab, Barrister-at-Law, Equity Bar. London: Horace Cox.

The County Courts Equitable Jurisdiction. By Henry M. Sladen, Esq., Barrister-at-Law, Lincoln's Inn. London: Wildy & Sons.

WHEN the County Courts Equitable Jurisdiction Act was passed, it was expected that a vast amount of additional work would be thrown upon the county court judges. Many of them were called upon to administer a branch of the law of which they knew but little either as regards the practice or the general principles. The great proportion of cases to be decided in the county courts must, and always will consist, of common law claims, and no doubt those learned gentlemen of the chancery bar who have been appointed county court judges, when first they took their seats, felt the same difficulty in deciding many of them that the common law judges, if we may use the term, will find in disposing of some of the cases which will come before them under this Act.

The same sort of remark will apply to all those professional gentlemen who are in the habit of practising in the county courts. Except in large towns and very populous districts, barristers are but very seldom found to attend regularly; by far the greater portion of the business has therefore to be conducted by attornies, many of them men of great and varied learning. But whether barristers or attornies, most of them would be willing to confess that they required some assistance, some book to refer to, in many of the cases submitted to them or which they were required to argue. Now, generally speaking, whenever an Act of general and practical importance is passed, some nice little pocket companion in the shape

of a book, is presented to the public, which contains the Act itself, some few notes, and an index. To those who want such a book, and can refer elsewhere for any other information they require, Mr. Sladen's book will be very acceptable—but something more is required—a book which in ordinary cases can be referred to in all matters likely to arise in court. The difficulty of producing such a work is great, but Mr. Gibbons and Mr. Harvey have endeavoured to supply this want ; it is hard to say they have failed, because it is clear that their book was got up in a hurry, but there is some merit in the way in which they have arranged it.

The first section of the Act sets out, in eight clauses, the different suits and matters in which the County Court is to have jurisdiction. To each of these clauses Messrs. Gibbon and Harvey have devoted a chapter. To treat all these subjects properly in something like 150 small pages would be impossible, but a future edition, enlarged and revised with care, might make it a useful book for ordinary purposes.

Kent's Commentary on International Law revised ; with Notes and Cases brought down to the Present Time. Edited by J. T. Abdy, LL.D., Barrister-at-Law. Cambridge : Deighton, Bell & Co. London : Stevens & Sons, Bell Yard.

Maritime Capture. Shall England uphold the Capture of Private Property at Sea ? By a Lawyer. London : Trübner & Co., 60 Paternoster Row.

PROFESSOR ABDY, in presenting us with that portion of Kent's Commentaries which relates to International Law, has supplied us with a work that has been for some time needed. When we find a book by an author of Mr. Chancellor Kent's world-famed eminence, edited by a gentleman of distinguished ability, we may justly expect a volume of great merit. We are not disappointed in that expectation, as the work comprises a full discussion of the subject without being prolix or tedious.

The subject treated of has of late years become generally popular, and a good modern text book was much required. Dr. Abdy commences by giving us an account of the foundation and history of the law of nations, of the rights and duties of nations in a state of independence, of intervention, and of recognition. He then proceeds to tell us in a clear manner of the position of ambassadors and consuls. The most interesting part of this work, at all events to the general reader, is that in which maritime capture is considered, a subject which has of late years occupied the minds of all thinking men in consequence of it having been brought so prominently forward in the events arising out of the late American war.

What has been called "Mr. Marcy's final proposition that there should be a treaty by virtue of which commerce should be protected by exemption from seizure, is one that presents itself broadly to the

mind of every Englishman ; and naturally so when we consider how much larger are the interests of the British nation, in this respect, than that of other countries, whose commerce and trading at sea bear so small a proportion to our own. Powerful as our naval force may be, it is inadequate to protect our commerce in the event of our becoming a belligerent power. Could we possibly expect any nation inferior to us in naval armaments, but powerful in other respects, to enter into a treaty adopting the proposition of Mr. Marcy to its full extent, and so to give up the most powerful weapon in their hands for harrassing an enemy ?

In time of war, the main object must be to harass and injure, and to overpower and destroy the enemy in every possible manner, and one of these is by destroying its trade. If a belligerent power is allowed to carry on its commerce with impunity ; it may still continue to be at war and be prosperous ; but if trade is suspended, business at a standstill and thousands of mechanics thrown out of work, destruction and ruin fall upon the country, and this method of harrassing the enemy is felt by them much more deeply than the mere expenditure of powder and shot, or even the loss of men, and compels them to succumb to superior strength at an earlier period than they otherwise would. An interesting pamphlet on this portion of international law has been sent us, entitled "*Maritime Capture—Shall England Uphold the Capture of Private Property at Sea?*" were the matter is argued with some ability. The author says, and at the first glance one may be inclined towards the same opinion—"The wealth and magnitude of the merchant ships sailing under the British flag are out of all proportion greater than those of any other nation. To England belong almost all the great lines of ocean steamers, the most valuable and important vessels afloat, and the carriers of the most important and most valuable freights. To England also belong the regular traders to India, China, and Australia, which are, with the exception of a certain number of American clippers, the best built and best manned sailing vessels in the world. Other nations, *e. g.*, the Americans, Norwegians, or Danes, may be gaining on England in mere tonnage ; and in the cheaper trades, *e. g.*, the cotton and timber trades, their ships may have the advantage over ours. But the best ships still belong to England ; and the British flag still covers the most valuable freights. It would be little consolation for the loss of a Cunard steamer, freighted, perhaps, with a large amount of specie, or of an East Indiaman laden with silk, tea, and indigo, to know that our cruisers had captured a pine-built ship of the enemy laden with cotton or with timber." It seems to us absurd to imagine two belligerent states holding friendly intercourse through the medium of their merchants and traders, and whilst the ships of war are cruising about the harbours and forts in search of some other iron-clads to fight with, the merchantmen, laden perhaps with bars of gold (the very sinews of war), are sailing under their bows, and carrying their treasures harmless.

As might be expected, the case of the Trent has been gone into by Dr. Abdy, and those who are interested in this matter, should

also consult an able pamphlet by Mr. Henry W. Lord on the same subject*.

After considering the rights and duties incident to a time of war, the Professor, in conclusion, enters into the subject of the negotiations and treaties which either interrupt a war or terminate in peace, and of the violations of these treaties, and thus brings to a close an instructive and well-arranged volume, which will be useful to all readers.

We cannot conclude our remarks on this very valuable book, without calling special attention to the admirable chapter on the Foreign Enlistment Acts, a subject generally discussed during the unhappy period of the late American Civil War. It is, in itself, an exhaustive treatise on that question, which we owe entirely to the pen of the learned editor.

The Copyhold Enfranchisement Manual. Third Edition. By Rolla Rouse, Esq., Barrister-at-Law. Butterworths, 7 Fleet Street, London.

WHEN we consider what favour Mr. Rouse's "Practical Man" and "Practical Conveyancer" have found with the profession, we feel sure the legal world will greet with pleasure a new and improved edition of his "Copyhold Enfranchisement Manual." The third edition of that work is now before us, and is divided (as was the second edition) into five divisions.

Mr. Rouse having in the first and second divisions treated the subject generally, proceeds in the third to explain in a masterly style the principles on which enfranchisement calculations should be made with regard to the rights of the lord of the manor, and then gives tables of the rules for calculating the value of enfranchisement from the lord's rights, and examples showing how these rules operate, and in the fourth and fifth divisions are given the forms of deeds, notices, contracts, &c., and the statutes with notes. It is a work of great practical value, suitable to lawyers and laymen. We can freely and heartily recommend this volume to the practitioner, the lord, the steward, and the copyholder.

Judge Redfield's Letter to Senator Foot upon the Points settled by the War—the Status of the States attempting Secession—What Benefits we have derived from the War—the True Policy of restoring the Government under the Constitution. New York: Hurd and Houghton.

THIS little pamphlet will be read with interest by all those who have at heart the welfare of the Great Republic of North America. Coming as it does from the hand of one of the judicial functionaries of the United States, to whose decisions our greatest lawyers look

* "The Highway of the Seas in Time of War." By H. W. Lord, M.A.

with respect, it will be considered with grave attention. The legal bent of mind of the learned author is apparent throughout this letter, and although we are loth to say one word in disparagement of anything coming from the pen of Judge Redfield, who evidently writes in a spirit of philanthropy and benevolence, we confess that we cannot quite follow his analogy between war and an action at law. The author writes as follows on a subject that was recently much discussed in this country :—

“The legitimate effect of secession and rebellion is therefore, as before intimated, that all the *individual persons* who have voluntarily favoured and supported it have become subject to all the penalties of treason ; they have forfeited to the national government not only all their property but their lives. And the government may deal with them for their offences in all legitimate modes. And if they adopt irregular and unlawful modes in dealing with traitors in perilous times, we do not intend to be very nice in our criticisms in regard to it.”

Judge Redfield goes on to say (and his remarks apply to a large number of unfortunate individuals in the Southern States)—

“But we desire to protest on behalf of those who have all along, to the utmost of their ability, sustained the Government far more than the Government were able to sustain them, that they shall not be overwhelmed in one universal overturn of all law and all rights under the law whether organic or municipal. Such a course would be scarcely less revolutionary than that attempted by the leaders of the rebellion itself.”

The question of suffrage is touched upon by the judge, and we presume, from his concluding paragraph, that we may hear more on that point from him hereafter.

The Cattle Diseases Prevention Act, 1866, and the Orders in Council relating thereto, with Commentary on the Act, explanatory of its working. Second Edition, containing the new Order in Council. By R. Cecil Austin, Esq., of Gray's Inn, Barrister-in-Law. Nicholls, Brothers, Frederick Street, Gray's Inn Road, London.

THIS seasonable publication is intended, as the editor himself tells us, rather for those who are affected by the provisions of the Act, or whose duty it may be to carry them into effect, than for the mere lawyer ; and the fact of its having reached a second edition within a very short time affords a sufficient indication that its value, as a popular exposition of the statute and the related Orders in Council, has been recognised by the public. The unexpected rise and rapid progress of the cattle plague seem to have perplexed the government and the legislature as much as the farmers, and indeed it might well be doubted how far it was possible to arrest the course of the disease by an Act of Parliament or an Order in Council. The attempt, however, has been made, and without determining how far

it has succeeded, it is certainly true that the disease has diminished, and is still decreasing. At the same time the Act continues in operation, and for some purposes will do so for some time to come. In almost every district the justices or other authorities are calling for the funds necessary to meet the expenses incurred under the Act; and are encountering the difficulties which are presented by the defective construction of the clauses (Secs. 18 and 19 especially) relating to that important point. There can be no doubt that Mr. Austin's compilation and accompanying exposition will be found very useful by magistrates, farmers, and all others concerned.

The Definition of Murder considered in Relation to the Report of the Capital Punishment Commissioners, by James Fitzjames Stephen, M.A., Esq., Barrister-at-Law. London: Longman & Co., 1866.

THIS is a subject with which Mr. Stephen is well acquainted, and so long ago as June, 1864, he published an article in *Frazer's Magazine*, in which he reviewed the whole question of Capital Punishment. Since then he has been examined as a witness before the Commissioners, and the object of his present pamphlet is to make some remarks upon their recommendations; and he draws particular attention to the following paragraphs, in which they suggest the revision and amendment of the law relating to murder.

"8. We proceed to offer such recommendations as we think expedient for altering the present law of murder. It appears to us that there are two modes in which the change may be effected.

"9. The first plan is to abrogate altogether the existing law of murder, and to substitute a new definition of that crime, confining it to felonious homicides of great enormity, and leaving all those which are of a less heinous description in the category of manslaughter.

"10. The other plan is one which has been extensively acted upon in the United States of America, where the common law of England is in force; this leaves the definition of murder and the distinction between that crime and manslaughter untouched, but divides the crime of murder into two classes or degrees, solely with the view of confining the punishment of death to the first or higher degree.

"11. We have given both these plans our serious consideration, and we are of opinion that the required change may be best effected by the latter, which involves no disturbance of the present distinction between murder and manslaughter, which does not make it necessary to remodel the statutes relating to attempt to murder, and does not interfere with the operation of those treaties with foreign powers which provide for the extradition of fugitives accused of that crime. The object proposed can be attained by a short and simple enactment, providing that no murder shall be punished with death, except such as are particularly therein mentioned.

"These should be called murders of the first degree; all other murders should be called murders of the second degree, and punished as hereinafter recommended.

"12. We recommend therefore—

"(1.) That the punishment of death be retained for all murders deliberately committed with express malice aforethought, such malice to be found as a fact by the jury.

"(2.) That the punishment of death be also retained for all murders committed in, or with the view to, the perpetration, or escape after the perpetration, or attempt at perpetration of any of the following felonies: murder, arson, rape, burglary, robbery, or piracy.

"(3.) That in all other cases of murder the punishments be penal servitude for life, or for any period not less than seven years, at the discretion of the Court."

Now, Mr. Stephen, while agreeing with the Commissioners in their wish that the law should be altered, thinks that if their suggestion as to the mode of making the alteration is accepted, a most valuable opportunity of effecting a legal reform of the first importance will be lost, and that the existing condition of the law, bad as it is, will be involved in still greater confusion than exists at present. Mr. Stephen thus treats of the definition of murder, and argues that the great difficulty consists in the word "Malice," introduced into the definition by an unknown person at an uncertain time. When once it became a part of the definition of murder, the ingenuity of many subsequent generations of judges was exercised in trying to adopt it to new sets of circumstances as they arose. The consequence of the continuance of this process for many generations has been the production of what the Commissioners justly call arbitrary rules and nice and subtle distinctions of which the practical result is most unsatisfactory. Mr. Stephen, in order to show how and why it is so unsatisfactory, and how much more unsatisfactory it would be made if their proposed alterations were adopted, gives an interesting account of the law of murder and its history. We do not propose to follow him through the many authorities he quotes, beginning with Bracton. He finds fault with the definition given by Coke and Hale, and admits that Foster's definition of murder and malice, is far superior to both.

Malice, *i.e.*, "Such circumstances as are the ordinary symptoms of a wicked, depressed, malignant spirit." After treating at length upon all the common law definitions of the crime of murder, Mr. Stephen says, "That by far the greater part of the intricacy and technicality with which the Criminal Law, is justly chargeable, arises from their insufficiency, and from the manner in which successive generations of judges have endeavoured to make them meet, if possible, the requirements of successive generations. The great defect of the law, indeed, is that the leading crimes have never been defined at all in an authorotative manner." He then proceeds to give the following definition ;—

"1. Homicide is either accidental, or justifiable, or criminal.

Accidental and justifiable homicide are sufficiently ascertained by the law as it stands,

"2. Criminal homicide is either murder or manslaughter.

"3. Murder is criminal homicide committed without provocation, and either with an intention to kill or with an intention to inflict bodily injury or violence likely to cause death, coupled with indifference whether death is caused or not.

"4. Manslaughter is criminal homicide committed without either of these intentions, or with either of these intentions, but under provocation.

"5. Provocation is conduct likely to cause uncontrollable passion in an ordinary man. Acts are said to be done 'under provocation' only if the person committing them is, in fact, thrown by them into an uncontrollable passion, and does the act whilst so deprived of self-control.

"I will now proceed to contrast these propositions and the outline which they draw with the recommendations of the Commissioners. In the first place, they get rid of two expressions introduced by the Commissioners into their definition of murder in the first degree—'deliberately,' and 'express malice aforethought.' It appears to me that this is a great advantage. It is common to consider premeditation and deliberation as necessary ingredients of the worst kinds of murder, and this appears to have been the view taken by the Commissioners; but surely, there are other cases of murder, which are at least as bad in a moral point of view, and quite as dangerous to society. A person who suddenly conceives and immediately executes the resolution to kill another for some unlawful reason, not amounting to provocation, appears to me to be rather worse, if anything, than the man who decides to do so only after long deliberation. Suppose, for instance, that a person were to be discovered in the commission of an indecent or immoral action, and in order to prevent disclosure were instantly, without farther provocation, to kill the person who so discovered him, would not this show greater wickedness and a far more dangerous temper than the same crime committed after long hesitation and reflection? Yet the one would be a case of premeditation, and the other a case in which there was no premeditation. A policeman meets a thief or vagrant whom he has a right to search, and offers to search him; the thief or vagrant pulls out a pistol and shoots him through the head, forming and executing the design on the instant. Why is this to be treated as murder in the second degree? According to what test of the criminality of an action is it less criminal than a planned assassination, or than a murder committed in the course of a burglary?

"Consider, again, the indefiniteness of such a word as 'deliberately.' Is five minutes time for deliberation, or two, or one, or an hour? If it be replied that this depends on circumstances, this no doubt is true, but it proves that intention and not deliberation is the test, and that deliberation is important only as showing intention."

Books Received.

A Treatise on the Law of Stoppage in Transitu, &c. By John Houston, of the Middle Temple, Esq., Barrister-at-Law. London : Maxwell, Bell Yard. 1866.

Legal and Equitable Rights and Liabilities as to Trees and Woods. By Richard Davis Craig, Esq., one of Her Majesty's Counsel. London : Maxwell, Bell Yard. 1866.

Ayckbourn's Practice of the High Court of Chancery. Eighth Edition. By J. Napier Higgins, Esq., Barrister-at-Law. London : Wildy & Sons. 1866.

Treatise on the Law of Scotland relating to Parent and Child and Guardian and Ward. By P. Frazer, Advocate. Second Edition. By Hugh Cowan, Advocate. Edinburgh : Messrs. Clerk. London : Stevens & Sons.

Oke's Magisterial Synopsis. Ninth Edition. London : Butterworths, 7, Fleet Street.

Law Times for the Quarter.

The Upper Canada Law Journal for the Quarter.

Inglis's Inaugural Address as Lord Rector of the Glasgow University.

The Law of Partnership. By Joseph Dixon, of Lincoln's Inn, Esq., Barrister-at-Law. London : Butterworths, 7, Fleet Street. 1866.

A Handy Book of the Law of Merchant-Shipping. By Thomas Henry James, Esq., M.A. of Lincoln's Inn, Barrister-at-Law. London : Sweet. 1866.

Events of the Quarter, &c.

GEORGE HARRY PALMER.

THE BIOGRAPHY OF A JUNIOR BARRISTER.

THE stamp of brilliant success is not necessary to render a life interesting, or to justify a public record of it. On the contrary, the easy stages by which many rise to exalted positions make their biographies of little value, while the heroic struggles of others give a grandeur to lives that have ended in failure and disappointment. George Harry Palmer, did not achieve any distinguished success in the brief career that he had at the Bar. His reputation as a man of marked ability and of a depth of thought and sentiment which were nearly akin to genius, was confined to a limited circle of friends who had learned to appreciate his worth in private society. Although his work was prospering under his hands, and the circle of those who knew and valued him was widening every year, his success was more in promise than in reality. He was in view of the golden keys, but did not live to clutch them. Nevertheless, his life has much in it that many would like to know. The struggle that he made was a brave and honourable one. There was a heroism about his career that makes it worthy of public consideration—while his sad end gives it a tragic and mournful interest.

Palmer was descended from an old and well-known family who had lived long on the border district of Pembrokeshire and Carmarthenshire. They were men of the higher yeoman class, and were chiefly distinguished by their zealous profession of Welsh puritanism. A member of the family was an ejected minister of 1662, and the grandfather of the subject of this notice was ever an energetic and influential supporter of those principles which his ancestors had maintained. He was a man of mark and property, and declined the Commission of the Peace for his county on the old notion that such an engagement in the affairs of the world was inconsistent with the religion that he professed. George Harry Palmer was born at Wernligoes, in the parish of Llanvalteg, in the county of Carmarthen, December 29, 1831.

It is almost impossible for an English mind to realise the circumstances, chances, and obstacles to all progress in thought and society such as we most value in London, that surrounded a life commenced under such auspices, at such a time, and in such a place. Wernligoes is 250 miles distant from London; and in 1831 the mail coach took two days and a half to make the journey. It is in the

centre of a thoroughly Welsh district—where then the English language was rarely spoken. Overhanging this remote neighbourhood was the cloud of Welsh puritanism. Its influence was felt in every house, and moulded the character of nearly every life. Though in England, to a great extent, a symbol of the past, puritanism was there the life of the people, and the channel which all their enthusiasm and intellectual energy took. It presented an almost impassable barrier to the start in life of Palmer. Afterwards, when he struck out in another direction, and sought a clearer atmosphere and better light, the friends of his earliest years became alienated from him. We do not cast any reflection upon them; but it is necessary to state this in order, that we may be able to appreciate Palmer's conduct, when, without money, and even without encouragement from them, he had to fight the battle of life alone.

At an early age he was sent to a school at Narberth, the nearest market town. He afterwards went to study under Dr. Lloyd, of Carmarthen, and eventually joined the classes of the college of which that gentleman was the principal. Here he displayed the same indomitable perseverance that characterised him through life. Undaunted by obstacles, he worked steadily on year by year, storing his mind with knowledge, and cultivating a close acquaintance with the literature of many languages. The great and varied extent of his reading at this time was a marvel to some of his associates possessing less energy than himself. Added to this, he was blessed with a remarkably retentive memory, and a degree of self-possession rare in one whose boyhood and youth were spent amid the monotonous scenes of a calm country life, where society must necessarily be restricted to set ideas and forms.

The six years that he spent at Carmarthen were devoted to close study. He won some of the highest prizes that were given at the college, and became distinguished for genial humour and great fluency of speech. He matriculated in the London University in 1851; and then first beheld, "glowing like a dreary dawn," the lights of this great metropolis, in which so many of the remaining years of his short life were spent. He afterwards passed about nine months in France, drudging as usher at a school, and then again returned to some quiet and free study at Carmarthen.

In November, 1853, Palmer became a student of the University of Glasgow. At a time when the universities of England were virtually closed against all who were not prepared to subscribe to the thirty-nine articles, those Dissenters who wished to give their sons a superior collegiate education sent them either to Edinburgh or Glasgow. This practice has still continued, though the reason for it has now ceased. Palmer sought to carve out for himself an honourable career at the Glasgow University. The subjects that chiefly attracted his attention were logic, metaphysics, and moral philosophy. During his first two years at Glasgow his great aim in life was to become a distinguished metaphysician, and to earn some day the dignity of a professor's chair. He leant towards the philosophy of Germany—

but while he studied Kant it was Fichte that he admired and sought to imitate. He took the first prizes in the logic and moral philosophy classes, and won the university silver medal in mental philosophy. He was certainly one of the most distinguished students of his time, not only in the philosophy classes, but also in all the political and social organisations of the college. At the contests for the Lord Rectorship he was one of the leaders of the Liberal party, and was vice-president of the Liberal Association. The twelve or thirteen hundred young men who were with him as fellow-students at Glasgow were of course divided into different social cliques, according to their rank, opinions, and tastes. At that time Professor J. P. Nichol led a school of thought in Scotland, and dispensed liberal hospitality at the Observatory. He collected around him a circle of students, who were often at his house, and who had the privilege of his advice and patronage. Palmer was a member of the Observatory clique, and always regarded the association with Professor J. P. Nichol and his family as one of the most happy events of his life. In after years, this distinguished and kindhearted gentleman watched his career with interest, and gave him assistance at a time when he most needed it.

The following extract is from a letter written the year after he left Glasgow, and is full of his own exuberance of feeling: "I have just returned from Glasgow. As soon as I got into town I went in search of old student friends, and found D—, L—, and G—, scribbling away at immortal essays. Snow was lying six inches deep in the street; one of the genuine Glasgow fogs had been hanging about for four days, but these three were poring over great manuscripts in dingy rooms. Most joyous hours we spent together. We spoke nothing but Welsh. I gave a sermon in the old Welsh style, and they brought out the loud 'amens.' We had Welsh songs too, 'Ar hyd y nos,' and others that we have heard at the old Carmarthen fairs. I cannot tell you how much pleasure it gave me to hear old Welsh spoken again. I was surprised at my own fluency, and my speaking without hesitation gave me some notion of the amazement that Peter must have felt long ago when he preached in the strange tongues for the first time! I met all the fellows in the evening. Some are struggling for the Greek Medal, and some for the first in the logic, as of old. The Liberals and Conservatives had a jolly supper together. A lot of wine and toddy were drank, for which the Conservatives paid."

In May, 1856, Palmer took the degree of M.A. at the Glasgow University. He then obtained an engagement to teach the eldest son of a wealthy gentleman, resident at a country mansion in Scotland. He had thus an opportunity to settle his mind, and recruit his health after his long studies. So far he had no realised purpose in life. He had thought of entering the pulpit, then of taking his M.D. at Glasgow, and of becoming a medical practitioner; and then again a chair in metaphysics appeared to him the best thing that the world could offer. This only had been clear before him—that whatever he was to get in the world he was to win by the force of his own unaided efforts. At the

liberal mansion of this country gentleman he was treated with courtesy, and nowhere did the stream of his life flow more smoothly than it did during the time that he passed under its roof.

The number of men that go to the Bar is, we are informed, continually on the increase. To those who know well what an arduous profession that of a barrister is, and who have felt for themselves the severe trials of briefless years and the agony of hope long deferred, there is scarcely a sight more suggestive of thought than that of the common hall of Lincoln's Inn, when it is crowded with students in attendance upon lectures. There are the scions of aristocratic families going to the Bar in pursuance of a family tradition—there are distinguished University scholars who have the notion that they are to earn in life honours as easily as at college—there are the idlers whose parents design great careers for them—there are men of advanced years who are seeking only social position—and there are poor men with no income save what they can earn, who are worn down by work and study, but who dream of the woolsack and the judicial ermine. In all probability any experienced barrister would advise more than one-half of the number to give up vain dreams which are soon to end in disappointment and in the ruin of life, and to seek some other occupation. But such advice would be given in vain. There is an infatuation about going to the Bar, and once this infatuation seizes the mind, advice and exhortation are fruitless. These young men are filled with the prophetic knowledge that the bench or the woolsack is to crown in their case lives of honourable exertion, and when such great issues are at stake, light argument or impediments shall not interfere. The warnings of friends are thought to be tinged with jealousy and selfish interest. Thus on they go, to taste the bitter cup for themselves—some to sink soon and be lost—others to drift through an unsatisfactory life, neither of failure nor of success, and some few, by the combination of ability, boldness, interest, and good luck, to achieve distinction and win positions of honour.

In 1857, when Palmer was at rest in his northern retreat, a friend, then himself a student for the Bar, met him by appointment at Moffat in Dumfriesshire. Walking by the river Annan one quiet summer's evening, they talked about the Bar, its honourable struggles and its splendid rewards. Palmer's mind was ready to seize the idea of selecting such a career for himself, and that conversation decided the whole course of his life:—"Law has it," he writes to this friend a few weeks afterwards. "After much anguish of mind, I have crossed the rubicon of my life. My dear friend, you have saved me. My ambition was relapsing into a degenerate inactivity, and instead of having my mark high, I had accustomed my thoughts to prepare for a very low flight through life."

In November, 1857, he became a student of the Honourable Society of Gray's Inn. Palmer entered upon the study of law with an enthusiasm, and prosecuted it with an assiduity, that are rarely surpassed. To a mind that had been groping through the uncertain mazes of metaphysical philosophy, law, on account of its definite

results and practical application to the affairs of life, presented a new charm. Metaphysics call into activity the highest powers of thought, but the whole study is based upon a universal postulate, and ends only in a dream. Jurisprudence, as a science, is as grand as any other, but its object is palpable, and its principles have a direct reference to the life which we lead and to the society in which we move. It has a noble history of its own, which bears the impress of many nations and of many times. When we add to this the consideration that successful study in no other pursuit has the same chances of reward and honour, we cannot be surprised that so many of the best intellects which the country could produce have in all times been ready, like Blackstone, to forsake every other muse, and to devote to law their talents and their life. Palmer threw into his new occupation all the energy of his character. He gave up his engagement in Scotland in April, 1858, and came to seek his fortune in London. The trials and anxieties of his first eight or nine months there would have damped the energies of many a brave man. His great effort was to secure some employment upon the press; failing in that, he tried teaching, but even there he met with most unsatisfactory results. The following is an extract from a letter addressed to a friend at this time:—

“August 7th, 1858.

“I have consulted with ———, who is on the ———, but he knows of nothing at present, and can give no directions. I called at several offices, but the staff was complete, or the manager was out, and nobody could say when he would be in, and such like horrid stuff. At present all London is gathering shells and pressing sea-weeds, and cannot be bothered. My only plan is delay. I can live in London yet, some weeks—and if I should come to Wales this year it must be on foot, for I shall spend every farthing here first. I shall write as soon as dawn breaks.”

At length he secured some wretched teaching engagements. On October 16th he writes as follows:—

“I have read a little law this week. It is difficult for me to do much in that way, when at a quarter before nine I must be in Grosvenor Square, and after teaching two hours there, be at St. Paul's at 12. When that is over I am engaged writing biographies of Coke, Camden, and other great luminaries, for the ‘Biographical Dictionary,’ with which Dr. Nichol is concerned.”

In November he was appointed resident lecturer in classics and history at the Cavalry College, Richmond; and in January, 1859, he entered upon his duties there. While occupying this position, he diligently kept his terms, attended the classes of the readers at the Inns of Court, and pursued with increasing energy the study of the law. At this institution he passed one year, and afterwards became private tutor to a family at Bletchingly, where he continued for about nine months. These years of deep and severe study, and of laborious instruction, we must pass over. In December, 1860, the secretaryship

of the Law Amendment Society was vacant; and Palmer, although he had no personal interest to support him, determined to apply for it. "There are," he writes, "many applicants from both branches of the profession. My chance is small. Yet the attempt can do me no harm, and may be of some remote and unknown use." There were sixty candidates for the appointment. A committee reduced this number to ten, afterwards to six, and afterwards to three. Palmer's testimonials were of such a high character that he remained one of the three. Eventually he was elected by the council, and elected solely on account of the high qualifications that he possessed for the discharge of the duties of the office. The choice was as honourable to the council as it was to Palmer himself. In a letter to a friend, dated April 10th, 1861, he says:—

"Fortune has at length stooped to favour me. On the 8th inst. I was unanimously elected to the secretaryship. After years of obscure uncongenial toil, after long waiting and vexatious disappointment, my opportunity has at last come. This morning for the first time these many years I breathe freely, and feel the firm ground beneath me."

It will be abundantly clear to the reader that the subject of this notice did not belong to the *nil admirari* school of men. The feeling of reverence was ever strong within him. He looked at men through a glass that magnified their virtues, and concealed their defects. Life to him was surrounded with a halo of glory, and ever disclosed new things to revere and admire. "There is no sham," he writes, "about this Law Amendment Society. During the last ten years resolutions which have been carried at Pall Mall, have shortly afterwards passed into statutes at Westminster. What pleases me immensely is its thoroughness. Men do not come here to hear themselves talk, but they come as wise, learned, and earnest reformers." Lord Brougham was president of the society, and Palmer was necessarily brought under his notice. His lordship, with that kindness of heart which has ever characterised him through his long and distinguished life, accorded to Palmer his friendship, and eventually gave him a testimonial of his regard and esteem, which was the chief happiness of the last weeks of his life. In May, 1861, Palmer was first introduced to this eminent lawyer and statesman, at a meeting of the Law Amendment Society, and he thus describes his sensations to a friend:—

"I sat near and had to speak to Lord Brougham. Such strange feelings never took possession of me before. I felt as if some great spirit of the past was present, and as if a former century had come into the room with him. I thought of his great defence of Queen Caroline—of his legislative enactments, amounting almost to a code—of his former political power—of his extraordinary erudition and immortal fame. He is now a wondrous man. His face has still a fine fire in it, and his eyebrows and lips have a power and resolution that no man dare gainsay." The work connected with the secretaryship of the Law Amendment Society, Palmer found congenial and

instructive. He had to watch bills before Parliament, collect the law on patents, charitable trusts, bankruptcy, and other subjects that at that time were the subject of discussion among law reformers. In June, 1861, he was called to the Bar, and took chambers in the Temple. He joined the Western Circuit and attended the Central Criminal Court. He became a contributor to the *Law Magazine*, and undertook the editorship of a trades'-protection paper, for which he wrote articles on subjects of legal and commercial interest. Eventually, he secured a practice in London. He was a very fluent and able speaker. He often said that his mistake at first was the notion that a great speech was the most important part of advocacy. In truth, the connection that he had formed with the Law Amendment Society was not favourable to his success in the ordinary practice of the profession. Attorneys are jealous of giving their work to men who have anything to engage their attention besides briefs; and more especially are those members of the Bar unpopular among them who have taken upon themselves the advocacy of law reform. Soon after his call—between his engagements at the Law Amendment Society, his writing for the press, and his practice at the Bar—Palmer's hands were full of work, and to this work he devoted his best energies. He contributed a series of able articles to the *Law Magazine*, commencing with one on the "Law of Domicil." He read several papers before the Law Amendment Society, one of which, on the question of "Appeal in Criminal Cases," attracted considerable attention. Among his contributions to the press we may mention an article on the Yelverton case which appeared in the *Law Times*, and which contains the best summary and review of the legal questions involved in that trial that we have ever read. He took a great interest in the penal servitude question, and became one of the most reliable authorities upon it. He was secretary to a private committee that sat on this subject while the Royal Commissioners were pursuing their inquiries. His work thus went on accumulating. His friends, however, in 1863, were pained to see that his health was giving way. Old symptoms of pulmonary weakness, that had once appeared at Glasgow, became again visible. In the summer of that year he went to the beautiful seacoast of Pembrokeshire to recruit his strength. The change from the artificial life and hard work of London to relaxation amid the rude scenes of his early youth, aroused strange feelings in him. His mind, sensitive by nature, was made still more so by disease, and the sorrows of his life often tinged with melancholy all his thoughts. The following extract from a letter written at this time to a friend, from a little village near Tenby, is very characteristic:—

"Over three hours I have been sitting on a rock, alone with the old, old sea. I went back over the dreary wold of recent years to the simple memories of my childhood. I wished Nature to speak to me now as she did then, but her voice was silent. When I was a boy and first saw this scene, I felt at home with Nature; but has my artificial life in London made me false and guilty? At length I did

feel again as if Nature spoke to me, and I was happy. What a gigantic fraud upon her London is! When I think of it, I almost hear across the waves the roll of wagons and chariots, the many noises of the great markets, and the revelries of gilded rooms. We try to put Nature out. It has proved with me a failure."

From this time out, Palmer had one continual battle with ill health. From his work at chambers and in court he never shrank and he continued diligent in the discharge of his duties in connection with the press and the Law Amendment Society. When this society became amalgamated with the Social Science Association in 1864, Palmer ceased to occupy his position in it as paid secretary. He became, however, one of the honorary secretaries of the jurisprudence department of the Social Science Association, and soon afterwards was appointed editor of the *Law Magazine and Review*.

The story of his life saddens painfully towards the end. It was well that he had made the acquaintance of some good friends, who stood by him in the hours of his greatest trial. Towards the close of 1865, it was declared by the most skilled medical advisers that he could not live in England. A voyage to Melbourne was urged, and eventually decided upon. On the 30th of December, he left Gravesend in the steamer "London." She encountered boisterous weather as soon as she put out to sea. On the 2nd of January, 1866, she sheltered off Portsmouth, and Palmer sent on shore a letter to a friend, in which he spoke of the glorious hurricane without fear. On the 11th he foundered in that vessel in the Bay of Biscay.

Possibly some of our readers may require of us an apology for treating at length of a career that was marked by no great distinction. To the law student and junior barrister, however, the details of this life of struggle may not be without interest or value.

MR. CHISHOLM ANSTEY.

MANY of our readers may not be aware that when Sir J. Arnold, Chief Justice of the High Court at Bombay was obliged to leave India for a temporary purpose, Mr. Chisholm Anstey, a barrister enjoying at that time, perhaps, the largest practice at the Bombay bar, was appointed by the Government to act as deputy judge during his absence. Some time after Mr. Anstey had taken his seat on the bench of the High Court, a petition signed by 2,662 persons was presented to the Government praying for his removal. The grounds set forth in the petition were briefly that Mr. Anstey had, while so acting as judge, administered the law with undue but not illegal severity, and in a harsh and insolent manner, and that he was so far prejudiced against the natives as a body that it operated to their disadvantage when appearing before him as their judge.

To this petition, which was presented on the 30th of December

last, the following answer, dated Bombay Castle, Feb. 10th, 1866, was sent :—

Government's Reply to the Native Petition for the Removal of Mr. Anstey.

The following reply to the petition agreed to at a recent meeting at Mazagon Castle, for the removal of Mr. Anstey from the bench, has been addressed by Government to Sir Jamsetjee Jejeebhoy, Bart. :—

“ Sir, I am directed by His Excellency the Governor in Council to acknowledge the receipt of a petition praying for the removal of Mr. Anstey from the bench of Her Majesty's High Court for reasons assigned in the petition.

“ 2. The petition reached the secretariat on the 30th December; Mr. Anstey ceased to occupy a seat on the bench on the same date, and as Sir J. Arnould's return to India, which terminated Mr. Anstey's tenure of office as a judge was not unlooked for, His Excellency in Council can hardly suppose that the memorialists expected that the request with which their petition concludes could be literally complied with.

“ 3. Under such circumstances the usual course would be simply to acknowledge the receipt of a petition, compliance with the prayer of which was almost obviously impossible.

“ 4. But among the names attached to the petition are those of many gentlemen for whom His Excellency in Council entertains the highest and most sincere respect, and the request thus laid before the Government is one of such gravity and importance in itself that His Excellency in Council feels bound to state briefly the reasons which would have prevented a compliance with the prayer of the petition even had such a course been otherwise possible.

“ 5. The petition contains the names of 2,662 persons, of whom 1,278 are apparently Parsees, 1,191 Hindoos, 191 Mahomedans, and only one member each of the Jewish and Portuguese communities.

“ 6. It appears from the published accounts of the meeting at which this petition to Government was adopted, that the meeting was convened at a private house, without any public notice of the precise object of meeting, that the petition was produced ready drawn up, and was adopted and signed, without any such ordinary form of preliminary discussion as should entitle it to be considered the result of the deliberations of the meeting.

“ 7. I am desired to advert to these circumstances because the Governor in Council feels assured that the memorialists will, on reflection, see that Government could not regard an address so prepared and signed as being a safe index of the deliberate views even of those members of the community whose names were attached to it.

“ 8. But had the petition been so prepared and presented as to entitle it to be considered as the deliberate expression of the wishes of any large proportion of the whole educated community of

Bombay, the Governor in Council would still be unable to consider the specific grounds assigned in the petition as in their nature sufficient to justify the request with which the petition concludes.

"9. Those grounds are briefly the harshness and insolence of manner of the judge, and his undue but not illegal severity in administering the law.

"10. It is clearly not on these or any similar grounds that any Government could with propriety cancel the appointment of a judge who is not asserted to be otherwise than upright, able, inflexible, learned, and laborious.

"11. It can hardly be necessary to point out that such an extreme step as the removal of a judge for almost any cause, save for one implying incompetence, for wilful violation of the law, for neglect of duty, or for corruption, would be to establish a precedent which might hereafter become most dangerous to the administration of justice.

"12. The manifold and serious evils which must follow, if expressions of opinion, as in this petition, on judicial qualifications connected with other than the essential points above specified, were allowed to induce Government to take a step of such importance are almost self-evident. It would obviously then be open to all who believed such unfavourable opinions to be unjust to hold counter-meetings, the claims of judges might become subjects of private canvass and public controversy, and the tenure of office as a judge might be made, to no small extent, dependent on popularity, or unpopularity in society.

"13. Moreover, many of the assertions in this petition are obviously matter of opinion, and could hardly admit of proof, while few of the specific facts stated would be within the personal knowledge of more than a very few of the memorialists.

"14. There is one important charge, however, regarding which His Excellency in Council cannot but express his conviction, that the statements in the petition do Mr. Anstey a grievous injustice. He is charged with a prejudice against the natives as a body, which operated to their disadvantage when appearing before him as their judge.

"15. Whether such a prejudice existed would generally be matter of opinion, but in Mr. Anstey's case the imputation is discredited by the evidence of a whole life-time, during which he has ever been conspicuous for his ready sympathy with all whom he believed to need his advocacy, and this sympathy has been often manifested by him with the most marked disregard for all personal and sordid considerations.

"16. Up to the moment of his taking his seat on the bench, Mr. Anstey enjoyed, His Excellency in Council believes, as large a practice as any gentleman at the Bombay bar, and his clients were of course mostly native suitors, who would hardly have selected any advocate who was known to have a prejudice against all natives.

"17. This large practice Mr. Anstey resigned, at a great pecuniary loss, for no assignable motive but a public-spirited desire to strengthen the High Court at a period of great unusual difficulty, and His Excellency in Council trusts that when time shall have permitted the gentlemen who signed the memorial to reflect at leisure over the subject, they will exonerate Mr. Anstey from the unworthy motives imputed to him in the petition, and do justice to that learning, ability, energy, and independence for which, whether on or off the bench, Mr. Anstey has always been conspicuous.

"I have, &c.,

"C. CONNE,

"Secretary to Government.

"Bombay Castle, 10th Feb., 1866."

This valuable State paper will not only be read by every friend of Mr. Anstey's with pleasure, but it deserves the attention of every Englishman, whether a lawyer or not. Fortunately it happens but seldom in these days that such a charge is made against any of our judges as is mentioned in paragraph 9 of the above answer. It is as rare to find harshness and insolence of manner among our judges as it is to find the law administered by them with undue but not illegal severity; but if such a charge were established against a judge it is obvious that no government would, on those grounds alone, cancel his appointment.

Paragraph 11 proceeds to point out what may be considered good and sufficient reasons for removing a judge—incompetence, wilful violation of the law, neglect of duty, or corruption—for such faults as these, the only course open to a government would be to take the extreme step of removing him at once; but truly is it said that to remove for any cause short of those would be to establish a precedent which might hereafter become most dangerous to the administration of justice.

The answer involves no new principle. The same rule has always been acted upon in modern times in this country, and we trust always will be; and that such a paper should emanate from the Indian Government, under such peculiar circumstances, and when such pressure was brought to bear upon it, is the best guarantee that wherever British rule is established, the independence of the bench will be upheld.

To explain what we mean by peculiar circumstances, we must draw attention to the fact that the petition, in this instance, was signed exclusively by natives.

That this would have been likely to have exercised strong pressure upon the Government, we may learn from the following extract from the *Bombay Gazette*:—

"Our native readers will commit no error in generously acknowledging their mistake, and accepting the impartial judgment of a Government which has no object but to uphold the just rights of all the varied classes of this great community, and which cannot be

blamed for any undue harshness towards the native sections of it. We have often complained, on the contrary, that Government bestowed more than a due share of its condescension and smiles upon our native fellow-subjects, that is to say, as compared with the independent European community. The continuous policy of Government, ever since the mutiny swept over this country, has been to make the weight of its authority sit as lightly as possible upon the millions over whom it rules; and the government of Sir Bartle Frere, if it has exposed itself to any weakness at all, rather lies open to the charge of being over easy of access to the native community than inaccessible. If the petitioners bear this in mind, they will not charge Government with taking a partial view of their case, and will probably persuade themselves, now that the irritation is over, that the answer which has been given to their petition was the answer that a sound and judicious public policy dictated. British government and the British people are jealous of the purity of British law and the administration of British justice, and the petitioners may take it for granted that if a judge had violated the sacred trust reposed in him, Englishmen would not have left it to men of another race to vindicate the administration of justice, nor would an English government have needed to be stirred up to purify the bench. It is enough for us, however, that the independence of the bench has been sustained, and that the danger and impropriety of yielding to the demand of the petitioners has been clearly pointed out."

THE COUNCIL OF LAW REPORTING, AND THE LAW REPORTS.

Since our last number, the Council of Law Reporting have made a decided advance towards the full establishment of their important scheme. Early in January they announced that the subscription list for the United Kingdom, for the present year, would close on March 17; and that, after that day, the Reports could only be obtained through publishers. The policy of this step was not immediately apparent. But the result has shown its prudence.

The necessity of deciding upon a given day whether to take the Reports or not, had the desired effect upon waverers. Within the week preceding March 17 some hundreds of subscribers sent in their names, and some thousands of pounds were remitted to the Council.

Their actual receipts exceed £18,000, and the number of subscribers exceed 3,550. The list is still open for the Colonies, India, and foreign countries, and is being constantly added to from these quarters. The Council may, therefore, be considered to have achieved a financial success; and the extent of professional support already received, seems to have solved two portions of the great problem of the reform of our old system of law reporting. 1. That one series of Reports, which may be accepted as a standard of authority by judges, advocates, and practitioners, is a thing desired by the profession. 2. That such a series of Reports should be taken out of

the influence of commercial speculation and be placed under professional control. The success of the Council, thus far, however, only increases their responsibility for the future. They must not permit themselves, nor be allowed by the independent censorship of professional opinion, to become inferior or fall into a perfunctory discharge of their duties. If the Law Reports do become the general standard of authority, they can only acquire and sustain that position by their efficiency. The Reporters must be supervised by the editors, and both editors and reporters by the Council. We should hope that our professional brethren will not hesitate to communicate fairly and unreservedly to the Council upon the subject of whatever errors or defects exhibit themselves in the Reports. As to the common law and equity series, the March and April numbers show, we think, a decided improvement upon their predecessors, and we trust this improvement will continue. In the first number of the appellate series, published April 1, the Scotch cases particularly call, however, for strong observation. We are aware that in the House of Lords, as well as the Privy Council, the authorised reporters accepted the appointments which the Council under the Bar scheme were bound to offer them; and the Council, therefore, are not responsible for the selection. But we doubt not that those highly honourable and learned gentlemen will feel that they now owe allegiance to the profession; and that their best energies will be devoted to the discharge of the duties they have undertaken. But we do not hesitate to say that the style of reporting the Scotch cases should be greatly changed. It is a serious mistake to endeavour to enliven the prosaic dullness of a law report by a semi-ludicrous epithet or turn of expression. The pleading, the facts, the arguments, the authorities, the decisions—these alone are what the reporter has to deal with—*verb sap. sat.*

We believe that since the 17th instant the Council have, as might be expected, received several applications to be allowed to subscribe by persons who may like to apply in time; and that the Council has wisely, as we think, abided by their public announcement and referred all applicants to the law publisher. Some of these, we are glad to know, are willing to supply the Reports at a very moderate increase upon the subscription price. The publishers, were, we think, not wise in their generation, in looking in the outset upon the Bar scheme as so strongly antagonistic to their interest. We believe that if the Law Reports are firmly established, the public benefit to the profession in being able at last to get for £5 5s. what before they could not get under £25 or £30, will, like all good that results from wise reforms, beget other benefits of which the publishers will have their share. If less money is necessarily spent upon reports the members of the profession will have more money to spend upon text-books, and many will doubtless spend it.

We shall be glad to see that the Law Reports are established to the advantage of the profession—but with as little injury as possible to existing interests. We should be sorry to see an over active spirit

of competition at work to produce a greater multiplicity of reports than is desirable. Consistently, however, with the successful establishment of one standard set of reports, we think there is room for reports of a more ephemeral style and system, and that popular legal publications of the class of which the *Law Times* is *facile princeps* will yet be useful, and be encouraged by the profession. In recording as an event of the quarter the financial success of the Law Reports, we conceive we can record the first step towards an efficient improvement of the law for the success of which the Bar, as a body, acting under the presidency of Sir Roundell Palmer, are entitled to take credit. With our expressions of approval we have intermixed words of warning to the Council, and these we hope will not have been urged in vain. The editors and reporters will feel that the eyes of the profession are upon them, and that they will be supported in proportion to the efficiency of their labours. They are now engaged in the honourable exercise of a valuable professional privilege, and are no longer exposed to the vicissitudes, disappointments, vexations, and distractions of commercial engagements. As to other series or sets of reports, those interested in them will judge what course is best for their own interest to adopt; if the profession abide by the resolution that one standard set is all that is required, the remedy for the evil of multiplicity is ultimately in their hands, and we trust they will apply it.

THE SAVIGNY INSTITUTE.

At the sixty-fourth meeting of the Juridical Society of Berlin, held on the 10th February, 1866, the following special report upon the Savigny Institute was laid before the meeting by the President.

Immediately after the death of Doctor Friedrich Carl von Savigny, which took place on the 25th of October, 1861, the Juridical Society resolved to perpetuate the memory of the wide spread and thorough usefulness of this great jurist, not only by a public meeting, but by erecting as a memorial of him an institution which, supported by the aid of grateful scholars of all nations, might extend afar its blessings and its benefits. This decision was announced at the ceremonial meeting in remembrance of Savigny, which was held by the Juridical Society on the 29th Nov. 1861. The foundation committee, composed of 17 persons, at once began the collection of contributions.

These contributions having up to the 3rd of February, 1863, reached the sum of 16,436 thalers, the foundation committee on the 27th March, 1863, decided upon the statutes of the institution, which, being approved by the respective Academies of Sciences of Berlin, Vienna, and Munich, received the royal sanction by Order in Council of July 20th, 1863.

The capital of the institution, which is composed of the paid in subscriptions, amounted on the 1st of January, 1866, to 23,823 thalers, 11 silbergroschen, while the interest fund of the year 1865

amounted to 1,128 thalers, 23 silbergroschen. The latter sum, together with the interest for the year 1866, will at the commencement of the year 1867 be placed at the disposal of the Royal Academy of Sciences of Munich, as ordered by the statutes for the objects of the institution.

The Imperial Academy of Sciences of Vienna, which by letter from the council of the institution dated 21st January, 1865, was empowered to dispose of the interest of the two years 1863 and 1864, viz., the sum of 1,500 thalers, has addressed to the council the following letter :—

“The Committee appointed for the Savigny Institute by the Department of Philosophy and History, gave in its report at the meeting of the 6th inst., together with its proposal for the most suitable application of the sum of 1,500 thalers placed at the disposal of the Imperial Academy by the council of the said institute. The Committee, by virtue of sections 16 and 20 of the statutes of the Savigny Institute, has come to the conclusion to assist with the said sum of money the carrying out of a work on jurisprudence. For this purpose it has selected the work already commenced by Professor Dr. Maassen, of Gratz, and calculated to extend to five volumes, ‘History of the Sources and of the Literature of the Canonical Law in Western Europe until the close of the Middle Ages,’ having first carefully examined the annexed programme of the work handed in by the author, and which has been found duly suited to the object in view.

“In order to assist Dr. Maassen in making another journey to Paris or Brussels before the publication of the first volume of his work for the examination of manuscripts, as also to make if necessary a journey to Rome before the publication of the second volume for the like purpose, the Committee have reported it to be desirable to pay over by the following instalments the amount allotted for his assistance :—

	Thalers.
“1. Of the interest due on the 1st of March, 1866, immediately after that date	400
“2. When the first volume is ready for the press ...	200
“3. On publication of the first volume	250
“4. When the second volume is ready for the press.	200
“5. When the third volume is ready for the press ...	200
“6. When the fourth volume is ready for the press.	200
“7. When the fifth volume is ready for the press ...	50
Together	1,500

“To the 50 thalers, subsequently might be added the interest accruing from the monies to be gradually advanced.”

The Committee further recommend—

“1. That Professor Maassen should be called upon to make a report to the Imperial Academy of the results of his journeys.

"2. That on the title page of his work he should announce that it appeared with the assistance of the Savigny Institute, and by the recommendation of the Imperial Academy.

"These recommendations were adopted by the department of philosophy and history at the above-mentioned meeting of the 6th, and by the academy itself at the meeting of the 28th December, 1865, and the court has the honour therefore of bringing this resolution of the Imperial Academy of Sciences respectfully under the notice of the Council.

"The Court of the Imperial Academy of Sciences.

(Signed) "DR. THEODOR GEORG VON KARAJAN.

(Signed) "A. SCHROTTER."

"Vienna, December 29th, 1865."

In the programme accompanying this letter the author states that he was urged by Brenier in his own and Savigny's name in September, 1856, and subsequently also by the latter direct, to undertake this work, the idea of which was already present to his mind. He was thereby confirmed in his conviction of the necessity of the projected work, and in the belief in his own power to carry it out.

To this statement he appends a detailed account of his preparatory labours during a period of ten years. The aim of his work is in fact a history of the collections of the sources of canonical law ; as however these sources have become of importance for jurisprudence merely by their preservation and propagation in the collections, the author believes that he does not say too much when he describes the object of his work as a history of the sources. He takes the opportunity of pointing out that Savigny gave to his famous work the title of "History of the Roman Laws during the Middle Ages," while it is in fact principally literary history.

The collections of the canonical laws were really closed before the termination of the Middle Ages ; literature, however, in the main retained its former character, until with the regeneration of science a new era commenced also for the science of laws. For this reason he has adopted as the limit of his labours the close of the Middle Ages.

For the treatment of the subject the author has decided to divide it into the following four periods :—

1. The period preceding the middle of the ninth century.
2. The period from the middle of the ninth to the middle of the twelfth century.
3. The period from the middle of the twelfth to the middle of the fourteenth century.
4. The period from the middle of the fourteenth century to the close of the Middle Ages.

The author intends to divide the matter into five volumes. The first volume he devotes to the first period, the second volume to the second period, the third and fourth volumes to the third period, and the fifth volume to the fourth period.

The first volume will be introduced by a preface which will refer to both the first and second volumes, and will treat of the literature of the canonical collections and previous labours on this subject. As the aim in view is twofold, viz., 1. A history of the collections ; and, 2. A history of the literature, the treatment of each period, with the exception of the fourth, will naturally be divided into two sections : 1. The collections. 2. The literature.

The farther details respecting the work, which are contained in the appendix to the letter of the Imperial Academy, must be omitted on account of their length.

The Council at their meeting of the 27th ult., decided to give effect to these recommendations by communicating to Professor Dr. Maassen the contents of the letter from the academy, and after he had given his consent (which has already been received), by making payment to him in the manner above stated.

The assembly received with lively interest these communications as to the progress of the Savigny Institute, which although originated in this Society, is supported by the savants of every leading nation in Europe, and whose first fruits are to be applied to the promotion of an undertaking suggested by Savigny himself, though he was not permitted to have the gratification of witnessing its completion.

DIGEST OF THE LAW.

A deputation from the Council of the National Association for the Promotion of Social Science assembled on Tuesday, March 6, by appointment, at the official residence of Earl Russell in Downing Street, to urge upon his lordship the expediency of taking immediate steps for the formation of a digest of the case law of England. His lordship, unfortunately, was so much indisposed as to be unable to meet the members of the deputation, who had assembled in considerable numbers. A special message had been sent to Sir James Wilde, judge of the Probate Court, who was expected to attend, to apprise him of this intelligence, and members of the House of Commons and others left at once on hearing it, but a sufficient number remained in Downing Street to consult as to the ulterior steps to be taken in the matter. Among those present were the Earl of Harrowby, K.G.; Lord Milton, M.P.; Mr. Ewart, M.P.; Mr. Bazley, M.P.; Mr. Cheetham, M.P., Mr. Peel, M.P., and Mr. Platt, M.P., representing the Manchester Chamber of Commerce; Mr. Norwood, M.P., of the Hull Chamber of Commerce; Mr. Hadfield, M.P., of the Sheffield Chamber of Commerce; Mr. Padmore, M.P., and Mr. Sheriff, M.P., of the Worcester Chamber of Commerce; and Mr. J. S. Wright, of the Birmingham Chamber of Commerce; Mr. Williams and Mr. Wilson, of the Incorporated Law Society; Mr. Gassiot, F.R.S., of the City of London; Mr. G. W. Hastings and Mr. Westlake, honorary secretaries of the Association, and other members of the Council. Mr. Hastings stated that he had received letters from Lord Stanley, M.P., Vice-Chancellor Sir W. Page Wood, Mr. J.

Stuart Mill, M.P., and others, expressing regret at their unavoidable absence, and their entire concurrence with the object of the deputation. Great regret was expressed, especially by the gentlemen representing the mercantile interests, that they were deprived of the opportunity of laying their views before the Government on what they believed to be an important and practical public question. Little doubt seemed to be entertained that some proposition for a digest would be entertained by the Government, especially as it was understood that a sum of £5,000, voted by the House of Commons during last session, might be made available for the purpose ; but fears were expressed by several members of Parliament lest the work should be undertaken after the same fashion as that of the late statute law commission, and should lead to the same unsatisfactory results. It was at length determined, on the suggestion of Mr. Ewart, that the subject should be brought before the House of Commons, and that a meeting of those present, with others interested in the question, should, if necessary, be convened. It was also agreed, on the motion of Lord Harrowby, that the memorial prepared by the deputation should be sent to Earl Russell, with the names of its supporters.

The following is a copy of the memorial :—

“ The Council of the National Association for the Promotion of Social Science (with which is united the Law Amendment Society) desire to represent to your lordship the expediency of issuing a Royal Commission, or of taking such other steps as to Her Majesty’s Government may seem advisable, for the purpose of framing an authoritative Digest of the Case Law of England.

“ That portion of the law is scattered over many thousands of cases, printed in more than 1,200 volumes of reports, which contain the decisions of the judges for several centuries. A number of these decisions are obsolete ; many, in fact from one to two hundred yearly, are impeached or overruled ; many are of doubtful authority ; many are conflicting ; many might be gathered under distinct heads, in a concise form, and be recognised by the legislature as settled and substantial law.

“ To effect this object, it would be necessary to do with the Case Law what has been done and is doing with the Statute Law—to discard what is obsolete or superfluous, to condense and arrange what is effective ; in short, first to expurgate, then to consolidate and revise.

“ This subject has frequently and for many years past been under the consideration of the Association and the Law Amendment Society, and the Council trust that the time has arrived when Her Majesty’s Government may be induced to take some active steps in the matter.

“ The considerable progress that has been made in the revision and consolidation of the Statute Law ; the work already done by the Commissioners appointed to prepare a code for Her Majesty’s Indian possessions : and the remarkable success of the Commission employed by the State of New York, in America, to codify its civil

and criminal laws—laws founded on our own, and to a great degree identical with them—suggest that a similar course should be immediately taken to reduce the unmanageable bulk of English Case Law to a clear and concise Digest.

“The need for condensing the Case Law into some moderate compass, and arranging it clearly, increases with the extension of the business of local courts. The County Courts have for some years possessed considerable jurisdiction in common law, and Parliament during the last session has invested them with extensive equitable powers. The judges of these tribunals, sitting for the most part without the assistance of a bar, at a distance from the libraries of the Inns of Court, and having to decide rapidly on the emergencies of the case, cannot be expected to master the intricacies of equity and common law in their present state of dispersion through law reports and text books; and the authoritative promulgation of a Digest would immensely aid them in the administration of that large and increasing share of the civil justice of the country which has been so beneficially intrusted to their hands.

“Several of the eminent men who have at our annual meetings presided over the Association, or over the Department of Jurisprudence and Amendment of the Law, have dwelt forcibly on the importance of this subject.

“Lord Brougham, in his address to the Association in 1860, says :—

“‘All men are now agreed that the only question is, shall there be consolidation or not, parcel of and preliminary to a complete code or digest of the law? In other words, shall the Government of this country perform its high and imperative duty of making the people under its rule acquainted with the laws made to protect their rights, but also the laws to which it requires their obedience, enforcing that obedience by the severest penalties?’

“The Right Hon. Joseph Napier, late Lord Chancellor of Ireland, in his address to our Department of Jurisprudence in 1861, advocated the carrying out of Lord Bacon’s ‘outline of a great reform : the statute law to be expurgated, classified, and consolidated ; the common law to be digested and methodised ; a standing commission to be set up in aid of current legislation.’

“In 1864 the Right Hon. Sir James Wilde, Judge of the Court of Probate, devoted his address as President of the same Department, to a consideration of the practicability of forming a Digest of the Case Law, and the following sentence, among others, shows his confidence in the work, provided it be adequately undertaken :—

“‘I cannot resist the belief that within the bounds of reasonable labour and time, the general principles and broad bases on which our common law reposes, and which tacitly guide the decisions of our courts, might be brought to the surface, grouped together, subordinated in their several relations, and contrasted in their differences. An attempt of the kind, and not without great success, was made by the late Mr. Smith in his leading cases. And those who have

studied the notes of that book will not fail to perceive how easily and with what success large groups of cases treated and handled together have been made to yield up short and succinct propositions of law. What I desire to see is a similar attempt made with authority and on a much larger scale, to be finally confirmed by Act of Parliament.'

"But the Council would especially quote the words employed by your lordship, when presiding over the Association at Liverpool in 1858, as expressing at once the need for commencing this labour forthwith, and the certainty of its being brought to a successful termination :—

"'No one can doubt that it would be a great public benefit if our laws could be set forth in a clear style, and contained in two, three, or four volumes of moderate compass. . . . If we proceed to consider what has been done in this country we shall find that, from the days of Lord Chancellor Bacon, to those of Lord Chancellor Chelmsford, the revision and consolidation of the law have been a consummation devoutly to be wished. Five years ago the enactment of a code was held out to our expectation ; each year we were said to be at the beginning of the beginning. Three administrations and four sessions of Parliament have promised, undertaken, and dropped the work. Is it not time that we should set about the task in earnest ? I will venture to say that if four or five persons of competent qualifications were appointed as Commissioners, they would in a few months make an actual commencement, and in a few years present to Parliament a complete code worthy of the country, simplifying and improving our laws, on principles fit to be adopted in an enlightened age, and founded on the solid masonry of our ancient legislation. Nor can I doubt that such a work would be sanctioned by Parliament, not, indeed, without debate, but without serious delay."

"The Council must observe that not five but thirteen years have now elapsed since the project of forming a code was spoken of by the then Lord Chancellor, and that though the work of the revision of the Statute Book has since been ably carried on, nothing has been done towards the formation of a Digest of the Case Law. The same distinguished lawyer, who so long since gave promise of a code, now again holds the Great Seal ; your lordship, who so well understands the subject and appreciates its vast importance to the whole community, is the First Minister of the Crown ; and the Council trust that the moment is therefore favourable for urging on Her Majesty's Government the expediency of at once taking the necessary steps for commencing the preparation of a Digest. That Digest, like an expurgated and revised Statute Book, would form an important step towards the enactment of a code ; but taken by itself it would be invaluable, and it is on its own merits that the subject is now urged on your lordship's consideration.

"BROUGHAM, *President.*

"G. W. HASTINGS, *General Secretary.*"

PATENT LAW.

The following resolutions are embodied in the Report of the Subcommittee of the Social Science Association on the subject of the Amendment of the existing Law of Patents.

“That it is expedient that there should be a Patent Law.

“That patents should be granted only after the examination and report of competent examining officers as to the novelty of the invention, as to its being the subject-matter for letters patent, and as to the sufficiency of the provisional specification ; but that where the report is adverse the applicant should be, nevertheless, entitled to obtain his patent, subject to the following conditions : —

“1. That the adverse report should be recorded, and printed with the specification.

“2. That in any proceedings, on or against the patent, the patentee should give security for costs.

“3. That in any such proceedings the patentee should be liable to the payment of costs of the opposing party, as between attorney and client, in case he should be defeated on any of the grounds, stated in the examining officer's report. The conditions as to giving security for costs and payment of costs, as between attorney and client, to be satisfied upon a certificate of a judge upon the trial of any cause that the validity of the patent has been affirmed at the trial.”

“That the trial of patent causes, as at present conducted, is unsatisfactory. That such causes should be heard before a judge sitting with one assessor ; but without a jury, unless all parties to the cause shall desire a jury. That the assessor should be appointed by the parties, with the approval of the judge ; and, in case the parties should not agree as to such appointment, the assessor should be appointed by the judge. That it should be competent for the court or a judge, with the consent of all the parties to a cause, to dispense with the assessor.”

“That no proceedings for the infringement of patents should be commenced except upon the certificate of a competent examining officer. That the application for such certificate should be founded on a written statement, specifying the part of the invention alleged to have been infringed, and the manner of such infringement ; by which statement the plaintiff should be bound in any subsequent proceedings upon the patent. That such statement may be amended by leave of a court or of a judge. If the examining officer's certificate should state that, in his opinion, there is no ground for the proposed proceedings, the intending plaintiff should only be allowed to take such proceedings upon the following conditions :—

“1. That such statement and adverse certificate should be given in evidence in the subsequent proceedings.

“2. That the intending plaintiff, unless otherwise ordered by a court or a judge, should give security for costs.

"3. That in any such proceedings the plaintiff should be liable to the payment of costs, as between attorney and client, in case he should be defeated on any of the grounds stated in the examining officer's certificate."

"That in any proceedings, the objections to the patent should be stated with particularity, to the satisfaction of the examining officer, subject to amendment, by leave of the court or a judge."

"That the grantee of letters-patent should be required and compellable to grant licences for the use of his invention, subject to the following conditions :—

"1. That such licences, as to their commencement, their duration, the amount to be paid, the manner of payment, and all other matters, should be settled by an officer to be appointed by the Commissioners, or by arbitration in the usual manner, at the option of the patentee.

"2. That such licences should be subject to revision every third year, at the option of the grantor or grantee respectively."

"That any licensee should have the option of continuing the patent by paying the stamp duty at the end of the third and seventh years ; the amount of such payments to be deducted from accruing royalties."

"That patents should not be granted for a foreign invention, in fraud of the rights of the true inventor thereof."

"That it is expedient that the term of letters-patent, in cases of exceptional merit and inadequate remuneration, should be extended ; that the exercise of this power of extension by the Crown, on the recommendation of the Judicial Committee of the Privy Council, has given general satisfaction to inventors and the public."

"That the law officers should have no original jurisdiction in the application for, or the granting of, letters-patent, in the matter of disclaimers, or of memoranda of alterations."

"That provisional protection should be granted, not upon the certificate of the law officer, but upon the certificate of an examining officer, subject to an appeal to the law officer in case either of the granting or refusal thereof."

"That the granting or the refusal of letters-patent should be subject to an appeal to the law officers or law officer acting as a court or judge or judges of appeal, subject to a final appeal to the Lord Chancellor."

"That any disclaimer or memorandum of alterations should be allowed only upon the certificate of an examining officer, subject to an appeal to one of the law officers, with a final appeal to any one of the courts of law or equity."

"That in proceedings on letters-patent it should be competent for the court or a judge to refer any application to an examining officer for his report thereon."

"That any opposition to the granting of letters-patent should be

heard by the examining officer reporting upon the application for such letters-patent."

"That the specification, as filed, should be reported on by the examining officer, and if the same be not in accordance with the provisional specification, or do not particularly describe and ascertain the nature of the invention, the patentee should be required to amend the same to the satisfaction of the examining officer; and in the event of the same not being so amended, the examining officer's report thereon should be printed with the specification; the decision of the examining officer requiring any amendment, and his decision as to the form thereof, to be subject to an appeal to the law officers, whose decision should be final."

"That, on application from the class affected by any patent, the Commissioners should be empowered, on such terms as they may consider right in the interest of the public, and which may be agreed to by the patentee, to purchase, out of any surplus fund arising from the fees paid for patents, the patentee's invention, with a view to its being thrown open to general use."

"That the Commissioners should be requested to carry out forthwith such of the foregoing resolutions as may not require farther legislation."

"That Mr. Webster be requested to prepare and submit a report in general accordance with the above resolutions."

TRIAL BY JURY.

A public meeting was held at Manchester in February to consider the propriety of adopting petitions to the legislature praying Parliament to pass a declaratory Act for removing doubts as to the right of an heir at law, or next of kin, or other person, to demand a trial by jury in all cases involving contested matters of fact, especially those affecting inheritance, status, or nationality, or the conflicting interests of the Crown and the subject. The Mayor (W. Bowker, Esq.) presided.

Mr. J. Heron (town clerk), in moving a resolution for a petition in favour of the object of the meeting, said it seemed strange that in these days the citizens of Manchester should be called together with a view of taking any steps for the purpose of maintaining unimpaired that right which had always been so dear to all Englishmen, and which had hitherto been supposed to belong to them without question. Trial by jury was described by Sir M. Hale to be the best mode of trial in the world. Blackstone, the great commentator, said it ever had been, and he trusted it ever would be, looked upon as the glory of the English law. Erskine, in pleading before Lord Mansfield, said that the constitution never intended to invest judges with a discretion which could not be tried and measured by the plain and palpable standard of the law. Earl Russell, in his "Essay on the English Constitution," said it was to trial by jury, more even than to representation as it at present

exists, that the people owed the share they had in the Government of the country. It was to trial by jury, also, that the Government mainly owed the attachment of the people to its laws, a consideration which ought to make legislators very cautious how they took away that mode of trial by new, trifling, and vexatious enactments. The resolution referred to recent legislation, and he would refer to some Acts of Parliament for the purpose of showing how monstrous a construction had been put upon one recent statute. In one Act—he thought it was the Common Law Procedure Act—the right of doing away with a jury trial was given only in cases where both parties were assenting, and where the judge, upon a distinct application made to him, decided that it was a case which might with propriety be determined without the intervention of a jury. The Probate Court Act was passed in 1857, and it was expressly provided therein that all important questions which could come under that Act should be tried by a jury. In the Divorce Court Act it was also provided that all important questions which there came under discussion should also be decided by a jury. There was also in that Act the following clause :—

“In questions of fact arising in proceedings under this Act, it shall be lawful for, but (except as hereinbefore provided) not obligatory upon, the Court to direct the truth thereof to be determined before itself without a jury. In the following year the Legitimacy Declaration Act was passed, in consequence of suggestions which arose during the discussion of the *Shedden* case. One of the first cases which came before the court for decision under that Act was the case of *Shedden v. Patrick*, reported 9 W. R. 285. In that case, strangely enough, the judge (Sir C. Cresswell) refused to allow a trial by jury. There was an appeal against that decision, and, of course, some time or other, if from other circumstances it did not miscarry, that appeal would be heard and disposed of by the House of Lords. It was in order that they might get rid of the doubt which was thrown by the law upon the decision in that case that it was felt to be important and absolutely necessary that a Declaratory Act should be passed, declaring that both then and now, and at all times hereafter, the right of trial by jury belonged (as it did by the common law) to every British subject on questions of that kind. However much and deeply they might sympathise with the *Sheddens*, if there was not a great public question to be decided, no one would have dreamed of asking the Mayor to convene a meeting on the subject. He hoped the meeting would feel that this was one of the greatest public questions that had ever been discussed. The only possible objection to the course which he felt certain that meeting would take, was that such a step had been unnecessary, inasmuch as it was impossible to imagine that the decision come to by Sir C. Cresswell would not be at once overruled when the case came before the House of Lords. But would it ever get to that tribunal? Parties were being positively ruined by the enormous expenses which were being incurred, and even if the case did come before the House of Lords, technical objec-

tions might be found to prevail, and to prevent the real question being decided. But what objection could there be to get rid of such doubts? Sir J. P. Wilde had in a more recent case, *Ryves and Another v. The Attorney-General*, 14 W. R. 17, decided and laid it down broadly that every party appearing or taking proceedings under the Legitimacy Declaration Act, had an undoubted right to have his case tried by a jury. When two judges disagreed, who was to decide? Was it an unreasonable request that the law on this subject should be placed beyond all question, so that it should be quite impossible in future times for any judge who might be disposed to take a different view from Sir J. P. Wilde, to refer to the decision in the case of *Shedden v. Patrick*, and again deprive a suitor of right to have his case determined by a jury?

The Mayor of Salford (W. Turner, Esq.), seconded the resolution, which was put and carried. A Committee having been appointed to carry out the resolution, the proceedings terminated.

CONVEYANCING AMONG THE IRISH BEFORE THE INTRODUCTION OF ENGLISH LAW.

Celtic Literature is now awakening considerable attention, and it is possible that as lawyers, we may feel some interest in Celtic Law. We know that the Welsh King, Howell the good, assembled all the learned men of his country, and by their aid codified the Laws of Wales. A translated copy of this code we may find in any of our public libraries. Of Irish law and procedure we know little, and some, probably, will be glad to hear that any law existed in Ireland at all before the time of Sir John Perrott. We avail ourselves therefore, with pleasure, of the following portion of an article on Irish conveyancing, forwarded to us by Mr. J. H. Smith of Dublin, and regret that we are not able to insert it at length.

"That a system of jurisprudence of a comprehensive nature existed in Ireland long anterior to the arrival of the Anglo-Norman invaders in the twelfth century, would seem a matter so obviously of historical certainty, that it appears almost unnecessary to offer any detailed proof of it. Nevertheless, the present seems a fitting occasion to recapitulate, however briefly, a few of the evidences that such a system was in operation in this country from a remote period. And that it gradually succumbed before the superior influences which, under divine Providence, have been brought to bear upon it.

As a necessary consequence of the system, and forming a co-existent part and parcel of it, there was a body of men who were the depositaries of the legal learning of the period, and by whom the deeds and muniments which the gradual advances of civilization rendered indispensable for the transfer of property were prepared."

A variety of circumstances, flowing from the civil and military occupation of the country by the Northmen of Scandinavia in the seventh and eighth century, and by the Anglo-Norman adventurers in the twelfth, led to the very general destruction of the greater part

of the written evidences and conveyances of the transmission of land and other property.

But yet enough has survived the ruinous effects of intestine commotions and devastating and sanguinary conflicts to afford a very considerable and important degree of insight into the working of the system of jurisprudence which, however suited to the times, yet followed the universal law of mortality.

Such was the progress of events in other countries of far greater extent, and Ireland could not hope to be exempt from that dispensation which prevails over all the nations of this earth.

It is rather a remarkable circumstance, that among the English who from time to time have settled in this country, men of learning and piety became most warmly attached to the faithful study of her early history. They have ever been foremost in rescuing from the wreck of time all that is most valuable and practically useful.

Acting upon the principle of the man who said : "'Tis greatly wise to talk with our past hours, and ask them what report they bore to Heav'n ;" They have ever borne in mind the loftier precept of inspiration.

Seek ye the old paths and walk in them, for that will bring a man peace at the last !' and to use the expressive language of a comparatively modern writer, they became : *Ipsis Hibernis Hiberniores*.

Sir James Wade, "one of His Majestie's Privie Council, and Auditor-Generall of the Kingdome of Ireland," Archbishop Ussher, Dr. Narcissus Marsh, Edmund Spenser, Sir John Davies and Baron Finglas, and a host of other names of men of learning ; the *gens togata* of peaceful professions might be adduced as unmistakable examples of this position.

From such men, and their writings, may be drawn the most striking testimony as to the statement so often put forward ; and, although occasionally overloaded by romantic fictions or highwrought and poetic fancies, yet truth ever remains, and rising above the superincumbent mass of error asserts her supremacy."

Venerable Bede and other Anglo-Saxon writers have been so frequently cited as affording the most conclusive testimony of the amount of piety and learning of which Ireland was the chosen abode at a remote period, and of the eminently great and good men whom she trained in her schools and sent forth to teach and instruct the warlike and almost intractable tribes of Scotland, England, France, Germany, Switzerland, and Italy, that it seems almost superfluous to go through a recapitulation of their unequivocal statements.

The following passage from a more recent writer, and it is painfully sad to reflect that it is from the pen of a learned Irishman, discloses a far different aspect of society. Having alluded briefly to the passages in Bede's history, he says, "had this venerable historian lived at a later period, he would see those boasted gifts of nature trampled under the foot of the hostile invader. Instead of

milk and honey he would have described Ireland as an island flowing with blood and plunged in all the horrors of almost continual civil warfare and confusion. Tranquillity was for ages a stranger in the land, except for those few gloomy and transient intervals that in general but preceded more dreadful storms.

But beside the evidences, which being indirect and undesigned, and coming from great and good men of another country, who were drawn by the course of events to make Ireland at least their temporary home, and in many cases the country of their adoption, and on that very account to be deemed most valuable and important, we have also preserved to us, most usually by men of distinguished attainments, uninfluenced but by the best motives, and occasionally by others who scarce seem to have been aware of the value of what they so preserved, some written documents and other tangible evidences which we have still the power of submitting to the severest scrutiny which modern scholars can institute and subject them to.

Among these are not only monumental and other inscriptions on gravestones and the doorways of ancient churches, as well as upon shrines or other reliquaries; but also some few but remarkable specimens of ancient charters, leases, mortgages, bonds, marriage settlements, and other deeds, which afford some most remarkable examples, not only of the skill and legal knowledge of our native conveyancers, but also of the expressive brevity and terseness with which they drew up the agreements, judgments, and other documents, with the preparation of which they were charged.

A considerable collection of these documents was made and published with learned annotations and elucidations, by Mr. James Hardiman, who embodied copies and translations of as many as nine and thirty in a paper which was read before the Royal Irish Academy on the 29th of February, 1826, and he took occasion to suggest that many others might be found by careful search in the library of Trinity College and other similar repositories.

Of the documents thus published, the learned editor informed us that many of them, though not dated, belonged to a period extending from the 12th to the close of the 16th, and even the early part of the 17th century, and though relating chiefly, if not exclusively to North Munster, the chief part of which was erected into a county by Sir John Perrot, when Lord Deputy in 1585, and thenceforward designated as the County of Clare; yet are, as the editor judiciously observes, most interesting at the present day, as being illustrative of manners and customs of a remote period.

Like most other collections, some of the documents taken singly might be deemed of little or no value, but when combined their utility becomes obvious and unquestionable.

The collection brings us down to the time when the laws of England under James I., were extended over the whole of Ireland, and when the Irish language ceased to be made use of in the preparation of legal documents.

To the most ancient conveyances and deeds, Mr. Hardiman suggests the application of the description given of Saxon instruments of a similar nature by the celebrated English antiquary, Sir Henry Spelman, whom he thus cites.

"The Saxons in their deeds observed no set form, but used honest and perspicuous words to express the thing intended, with all brevity, yet not wanting the essential parts of a deed; on the names of the donor and donee, the consideration, the certainty of the thing given, the limitation of the estate, the reservation, if any were, and the names of the witnesses, which always were many, some for the one part and some for the other. As for dating it was not usual amongst them. Seals they used not at all, other than (the common seal of Christianity) the sign of the Cross, which they and all nations following the Greek and Roman church, accounted the most solemn and inviolable manner of confirming.

"The Irish deeds of more recent date generally come with the description of those commonly in use in the time of Henry III. of England, and afterwards as given by the same author. I observe in the deeds of that time a very absolute and methodical composition, which, therefore, hath ever since been received, and conteynneth in a manner to this day, consisting upon the parts here following:—
1. The direction; 2. The parties; 3. The consideration; 4. The words of grant or donation; 5. The thing granted; 6. The estate of the grantor; 7. The habendum or estate granted; 8. The use whereto; 9. The reservation, if any; 10. The tenure; 11. The warranty; 12. The sealing and delivery; 13. The date; 14. The witnesses."

SPELMAN of Ancient Deeds and Charters. *Vide* his English Works, fol. Lond., 1723, pp. 234, 5.

THE ATTORNEY-GENERAL'S BILL FOR THE ABOLITION OF FORFEITURE AND ESCHEAT FOR FELONY AND TREASON.

The Attorney-General and the Home Secretary have this Session introduced a Bill which will, if carried, do away with some of the consequences which have from the earliest times followed a verdict of guilty in cases of felony and treason—viz., forfeiture and escheat, attainder and corruption of blood. When these penalties were first introduced into our law, as incident to a verdict of guilty in these cases, there was some show of reason for them; but that has long since passed away. When sentence of death for treason or felony—the most terrible and highest judgment in the laws of England—was pronounced, the immediate inseparable consequence by the common law was attainder, and the consequences of attainder were forfeiture and corruption of blood.

Forfeiture was twofold—of real and personal estates. By attainder in high treason a man forfeited to the Crown all his lands and tenements, and the forfeiture relates back to the time when the treason was committed.

The natural justice of this forfeiture or confiscation of property for treason, was said to be founded on this consideration : that he who has thus violated the fundamental principles of Government and broken his part of the original contract between king and people, has abandoned his connection with society, and has no longer any right to those advantages which before belonged to him purely as a member of the community ; among which social advantages the right of transferring or transmitting property to others is the chief. Such forfeitures, moreover, whereby his posterity must suffer as well as himself, will help to restrain a man not only by the sense of his duty and dread of personal punishment, but also by his passions and natural affections ; and will interest every dependent and relation he has to keep him from offending. Now this rule of forfeiture in cases of treason was antecedent to [the establishment of the feudal system in this country, and was supposed to have been transmitted to us by our Saxon ancestors, and formed part of the Scandinavian Constitution.

In the reign of Anne an Act of Parliament (7 Ann., c. 21) was passed to modify the law of forfeiture upon attainder for treason; but by an Act of George III., 39 & 40, c. 93, the former Acts were repealed, so that the law of forfeiture, in cases of high treason, is now the same as it was by the common law, or as it stood prior to the Act of Anne.

By attainder for felony the offender also forfeits all his chattel interests, absolutely, and the profits of all estates of freehold during life. It is interesting to notice what was felony punishable by death in the reign of Edward I. In Britton (Mr. Nichols' translation), c. 16, of larcenies :—" Let careful inquiry be made concerning robbers, thieves, and such like offenders : as to whom our will is that of those who rob or steal the goods of another amounting to twelve-pence or more—upon proof—such robbers shall be immediately adjudged to death." To this section there is a note which gives a curious reason for fixing upon the sum of twelve-pence as the limit of petty larceny. The commentator, in the MS. note, states that three-half pence (iii. mailles) a day was a poor living for a man, and at three-halfpence a day twelve-pence would be eight days' wages ; and as a man going without sustenance for eight days might be expected to die on the ninth, the twelve-pence has regard to the destruction of life, for which offence a man is rightfully put to death." A curious mode of reasoning, and making people believe that the punishment of death for stealing twelve-pence was not more than a sufficient punishment for the offence. But now it must be remembered that all distinctions between grand and petty larceny are done away with, and that stealing a penny is as much felony as stealing a thousand pounds.

In cases of murder, if persons were found guilty the judgment was—" Death for death, and let their moveable goods be ours, and their heirs disinherited ; we will also have the year and day of their inheritance of whomsoever they are holden that they may remain one

year and one day in our hands, so that we neither cause the tenements or woods to be destroyed or wasted, nor the meadows to be ploughed as was wont to be done in memory of felonies attained, such tenements being excepted whereof the felons were not invested or seized in their demesne as of fee, for of such lands as they held for term of life or years, or by fresh disseisin, or in fee farm rendering annually the true value, or in mortgage or on like condition we will take nothing. We will also, that their lands aliened after commission of their felonies be escheated to the lords of the fees, so that immediately after judgment given it shall be lawful for those lords to demand by our writ of escheat the tenements so aliened."

This continued the law as to all felonies whatever, until the statute 54 George III., c. 145, which enacts that no attainder for felony (except in treason and murder) shall extend to the disinheriting any heir, nor to the prejudice of the right and title of any person except the offender during life. And that every person having right thereto after the death of offender might enter upon his lands and tenements. This forfeiture arises only upon attainder. The forfeiture of goods and chattels accrues in treason and misprision thereof, and in felonies of all sorts: in case of even the larceny of a penny. Upon corruption of blood, which is one of the consequences of attainder, it is not necessary to say anything more than this, that in many of the felonies created since the reign of Henry VIII. by Act of Parliament, corruption of blood was saved, but in some of the Acts this was neglected or forgotten, so that corruption of blood, as well as present escheat, continued to be the usual consequences of attainder until by stat. 54 George III., c. 145, the latter penalty was in effect confined to treason and murder.

This was followed by another Act, the 3 & 4 Will. IV c. 106, which did away with these incapacities of inheritance, which were the consequences of the general feudal doctrine of the corruption of blood. Thus, in modern times, attempts have been made to do away with penalties which were more often a punishment to the innocent than to the guilty. Most cordially do we agree with the following remark of a contemporary. "It is unquestionable that the historical or feudal theory is no longer in accordance with actual facts. It is equally certain that there is no desire now in the nation, which is itself, under the name of the Crown, the principal gainer by escheat as well as by forfeiture, to exact penalties, to the payment of which the innocent have largely to contribute; there is, on the contrary, nothing to which there exists a more deep-rooted aversion than to involving the innocent in the condemnation of the guilty, and any plan will be gladly hailed which provides for the release of the family of an offender from the consequences of his guilt, other than that very hard and terrible share in the shame of it, and of its punishment, from which no legislature can relieve." Very few, if any, will doubt the propriety of such a measure, and the only wonder is, that such a bill was not brought before Parliament and passed long ago.

SIR JOHN HOWLEY, KNT.

The death of this learned judge, who was Prime Serjeant, took place on February 13, at his residence in Dublin. Sir John was called to the Bar in 1815, made King's Counsel in 1835, and Third Serjeant in 1843. In 1835, he was appointed Assistant Barrister of the county Tipperary, an office since converted into Chairman of the Quarter Sessions, which he held till last year, and in discharging the duties of which he gained general respect by his dignified, independent, and impartial conduct. At the Bar he never enjoyed a large practice, yet, when on some occasions he was called upon to discharge the important functions of Judge of Assize, his conduct won the approval of the profession.

ERRATA.—The signature to the article on "Courts Martial," in the last number of the Magazine, should have been as follows: "Lonsdale A. Hale, Captain Royal Engineers." And in the paragraph headed "The Patent Office Inquiry," line 6, the words "are sustained," were inadvertently printed for "unsustained."

EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

Hilary Term, 1865.

At the Final Examination of Candidates for Admission on the Roll of Attorneys and Solicitors of the Superior Courts, the Examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—Daniel O'Connell French, Charles Edward Salmon, George Nichols Marcy, Thomas Francis Rider Hammond, Henry Selfe Leonard, George Francis Riddiford, Roger Turner, and John Cory Monkhouse.

The Council of the Incorporated Law Society have accordingly awarded the following Prizes of Books:—To Mr. French, the Prize of the Honourable Society of Clifford's Inn. To Mr. Salmon, the Prize of the Honourable Society of Clement's Inn. To Mr. Marcy, Mr. Hammond, Mr. Leonard, Mr. Riddiford, Mr. Turner, and Mr. Monkhouse, each one of the Prizes of the Incorporated Law Society.

The Examiners have also certified that the following Candidates, under the age of 26, passed Examinations which entitle them to commendation:—Edward Bythway, Studholme Cartmell, William Outram Crewe, George Daintrey, George Henry Eaton, Thomas Edward Jeffes, Frederick Lovell Keays, Thomas Lawton, Thomas Norton (the younger), Arthur Vere Archer Powys, Charles Sansome Preston, Aymor Holloway Sanderson, Thomas Pallister Young, LL.B. The Council have accordingly awarded them Certificates of Merit.

The Examiners have further announced to the following Candidates, that their Answers to the Questions at the Examination were highly satisfactory, and would have entitled them to Prizes or Certificates of Merit if they had not been above the age of 26 :—Richard Henry Clutterbuck, Taylor Hughes Tomkinson, B.A., Arthur Whitworth Robinson, and Thomas Etheridge Harper.

The number of Candidates examined in this Term was 114 ; of these, 111 were passed, and 3 postponed.

APPOINTMENTS.

MR. ARTHUR HOBHOUSE, Q.C., has been appointed a Commissioner of Charities in the place of the late Mr. James Campbell, Q.C.

Mr. G. J. Shaw Lefevre, M.P., has been appointed Civil Lord of the Admiralty.

Mr. Horatio Lloyd has been appointed Recorder of Chester in the place of Mr. Beavan, resigned.

T. H. Terrell, Esq., of the Inner Temple, has been appointed Judge of the Clerkenwell County Court in the place of Mr. Serjeant Jones, deceased ; and Mr. F. Vaughan Hawkins has been appointed Junior Counsel for the Attorney-General in charity matters, in the place of Mr. Terrell.

Mr. Thomas Norton, the Queen's Coroner and Master of the Crown Office, has been called to the Bench of Gray's Inn.

Mr. E. A. C. Schalch has been appointed Lecturer at the Law Institution in the place of Mr. Markby, appointed a Judge of the High Court, Calcutta.

Mr. W. J. Payne has been appointed Recorder of Buckingham in the place of Mr. Markby.

The Benchers of the Inner Temple have elected the Rev. Alfred Ainger, late scholar of Trinity Hall, Cambridge, to be Reader of the Temple.

Mr. Joseph Rayner, Town Clerk of Bradford, has been appointed Town Clerk of Liverpool.

Mr. G. Cook has been appointed Registrar of the Court of Probate of the District Registry at Liverpool.

IRELAND.—Mr. C. R. Barry, Q.C., M.P., has been appointed Serjeant-at-Law.

Mr. Dennis Caulfield Heron, Q.C., has been appointed Law Adviser.

Mr. J. C. Coffey, Q.C., has been appointed Chairman of the County Derry, *vice* Mr. W. Armstrong, Q.C., resigned ; Mr. J. C. Neligan, Chairman of Louth, *vice* Mr. W. Hemphill, Q.C., appointed Chairman of Leitrim ; and Mr. P. Blake, Q.C., Crown Prosecutor for Mayo, *vice* Mr. W. Armstrong, Q.C., resigned.

Mr. Allan Nisbett has been appointed General Solicitor in Lunacy, in the place of Mr. Hazlitt, deceased.

Mr. Francis Longworth Dames has been appointed Crown Prosecutor for the counties of Carlow, King's, Kildare, and Meath, in the place of Mr. Walter Hussey Griffith.

AFRICA.—T. Wensley Blackall, Esq., has been appointed a Judge of the Courts of Mixed Commission for the Suppression of the Slave Trade.

HONG KONG.—John Smale, Esq., Attorney-General, has been appointed Chief Justice.

INDIA.—Mr. Justice Conch, of the High Court at Bombay, has been appointed Chief Justice.

Sir Charles Sargent, Judge of the High Court at Bombay.

Charles Collett, Esq., of the Madras Civil Service, Judge of the High Court at Madras; Mr. Alexander Ross, Mr. William Edwards, Mr. William Roberts, and Mr. Francis B. Penison, all of the Bengal Civil Service, Judges of the High Court for the North Western Provinces.

AGRA.—Mr. Charles A. Turner, of Lincoln's Inn, has been appointed Puisne Judge at Agra.

CALCUTTA.—Mr. William Markby, of the Inner Temple, has been appointed Judge of the High Court, in succession to Mr. Justice Morgan, appointed Chief-Justice of Agra.

CALCUTTA.—Mr. T. Dunbar Ingram has been appointed to the Professorship of Jurisprudence and Indian Law in the Presidency College.

INDIA.—Mr. E. C. Crastor has been appointed Civil and Sessions Judge at Hooghty during the absence on leave of Mr. A. Pigou, and Mr. H. C. Richardson Civil and Sessions Judge at Tipperah, during the absence of Mr. A. A. Swinton. Mr. W. Cornell, as Magistrate at Hourah.

MALTA.—Mr. F. Solly Flood, of the Midland Circuit, has been appointed Attorney-General of the City and Garrison of Gibraltar.]

Necrology. ---

January.

- 22nd. STEELE, L. U., Esq., Barrister-at-Law, aged 31.
- 24th. SIMPSON, GEORGE, Esq., Barrister-at-Law, aged 67,
- 26th. WRIGHT, — Esq., Solicitor.
- 28th. BURY, JOHN, Esq., Solicitor, aged 89.
- 29th. COCKER, E., Esq., Barrister-at-Law, aged 63.

February.

- 2nd. FOSTER, W., Esq., Barrister-at-Law, aged 72.
- 7th. DES BARRES, — Hon. Judge, late of the Supreme Court,
Newfoundland, aged 73.
- 10th. TATHAM, T. T., Esq., Solicitor, aged 87.
- 10th. WALKER, R. D., Esq., late Senior Registrar of the Court of
Chancery, aged 74.
- 10th. SOUTHEY, H. S., Esq., Barrister-at-Law, aged 59.
- 11th. FINCH, G. W., Esq., Solicitor, aged 72.
- 13th. WILLIS, F., Esq., Solicitor, aged 58.
- 14th. FOREMAN, R., Esq., Solicitor, aged 75.
- 16th. BROWN, W., Esq., Solicitor, aged 67.
- 16th. SIMON, H. A., Esq., Barrister-at-Law, aged 53.
- 17th. JONES, H. G., Esq., Serjeant-at-Law, aged 61.
- 19th. ADDISON, C. G., Esq., Barrister-at-Law.
- 22nd. PHILLIPS, R., Esq., Barrister-at-Law, aged 72.
- 25th. ANDERSON, R., Esq., Solicitor, aged 41.
- 27th. BROWN, R. L., Esq., Barrister-at-Law, aged 74.
- 28th. LEE, JOHN, Esq., Q.C., LL.D., F.R.S., aged.
- 28th. NEWTON, CHARLES, Esq., Barrister-at-Law, aged 47.
- 28th. CRIGHTON, W., Esq., Solicitor.

March.

- 2nd. CAMPBELL, JAMES, Esq., Q.C.
3rd. READ, JOHN, Esq., Solicitor, aged 39.
4th. WYETT, J., Esq., Solicitor.
11th. BARTLEET, W. S., Esq., Solicitor, aged 39.
14th. NICHOLETTS J., Esq., Solicitor, aged 81.
15th. STONOR, A. C., Esq., formerly Solicitor-General in Van
Dieman's Land, aged 48,
17th. EDWARDS, FREDERICK, Esq., Barrister-at-Law.
21st. COOPER, C. H., F.S.A., Solicitor, aged 58.
22nd. BARRY, M. T. R., Esq., Queen's Advocate and Acting Chief
Justice at the Gold Coast.
29th. ROGERS, W., Esq., Barrister-at-Law, aged 69.

April.

- 5th. HOBBS, WILLIAM, Esq., Solicitor, aged 52.
15th. VAUGHAN, E., Esq., Solicitor, aged 52.
17th. BERRY, H., Esq., Solicitor, aged 67.
20th. ROE, Sir FREDERICK, Bt., formerly Chief Magistrate at Bow
Street, aged 77.
24th. BAILEY, CHARLES, Esq., Town Clerk of Winchester, aged 66.
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THE
Law Magazine and Law Review :
OR
QUARTERLY JOURNAL OF JURISPRUDENCE.

No. XLII.

ART. I.—CRIMINAL PROCEDURE.

BY C. S. GREAVES, Esq., Q.C.

THE law of a country may not inappropriately be divided into the law which defines and regulates the rights, duties, and liabilities of the members of the community, and the law which governs the procedure by which those rights, duties, and liabilities, may be asserted, enforced, and vindicated; and if either of these laws be defective, the members of the community suffer by it; and in many cases quite as much practical injustice may be worked by means of defects in the law of procedure, as by the law which regulates the rights themselves being defective; and perhaps, where a man fails, through any defect in procedure, to obtain the rights which justly belong to him by the law, he has more reason to be dissatisfied than when he fails through some defects in the law defining his rights. Be this, however, as it may, there can be no doubt that the law of procedure ought to be made so perfect as to secure, in the best and simplest practical manner, the assertion and enforcement of the rights, duties, and liabilities of the members of the community.

Of late years much has been done in England to amend the

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practice in criminal proceedings, but much still remains to be done before it will be so simple and so satisfactory as it ought to be. In Scotland, if we mistake not, the criminal procedure is, in the main, much in the same state as it has long been, although grave doubts have been entertained, not only in Scotland but elsewhere, whether that procedure does not require large and liberal amendments. It would seem to be extremely difficult to assign any satisfactory reason why the procedure in criminal cases should not be the same in both England and Scotland. In every criminal case, the procedure ought to be such as is best calculated to secure the conviction of the guilty, without at the same time endangering the innocent; and there appears to be no state of circumstances existing either in Scotland or England, which is calculated to prevent the best form of criminal procedure, which can be devised, from being extended to both. In both countries the trial is by jury, and that being the case, there seems to be no more reason why all the proceedings previously to and upon the trial should not be identical in England and Scotland, than in any two counties in either of those kingdoms; and, on the contrary, whatever proceeding may be best calculated to enable a jury to hear and determine a case correctly in any one place, must be equally good for any other place also. If the matter were *res integra*, it can hardly be doubted that the same system would be inaugurated in both kingdoms, and a fair and candid consideration of the existing procedure in each, strongly tends to the conclusion that a much better system might be adopted in both. The system in each is manifestly defective in some respects, whilst in others it has equally manifest advantages; and it seems clear that each may advantageously introduce the practice which excels in the other, either entirely or with such modifications as may make it more perfect; whilst each may get rid of the defects which exist in it, and that by this means a single system, either altogether the same, or with very slight differences, may be framed for both kingdoms, with very great benefit to each.

The question is neither a national nor a party one; it is a question of mere right and justice: and as such it shall be dealt with in these pages. Our knowledge of the procedure in Scotland is necessarily drawn from the information of others, but no statement will be made which does not rest upon some Scotch authority which appeared to be perfectly trustworthy, and consequently it is but reasonable to suppose that the statements will be accurate.

In England, the King, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offence,* and, as a subject sues by attorney, so does the King by his Attorney-General, or in the case of the vacancy of that office, by the Solicitor-General.† And hence it is that in England the Attorney-General, or in the vacancy of that office, the Solicitor-General, has a sovereign control over all criminal prosecutions. He may institute any prosecution he in his discretion may think fit, and may stop every suit brought by another.‡ The Attorney-General rarely interferes with the private prose-

* 4 Bl. Com., 2.

† *Rex. v. Wilkes*, 4 Burr. R., 2,553-4. The Coroner of the King's Bench also prosecutes informations for the king as his attorney. And Lord Mansfield said that the form of Proclamation (1. Chitt. Cr. L., 552) at criminal trials, is a strong proof that anciently the King's Serjeant might prosecute for the king. Anciently, all the King's Serjeants had precedence over the Attorney and Solicitor-Generals; but in 1623, the Attorney and Solicitor-Generals were given precedence over all the King's Serjeants, except the two ancientest, and this state of things continued until 1813, when Shepherd, who was one of the two most ancient King's Serjeants, was made Solicitor-General. In such a case the practice had previously been to discharge the serjeant from his office as King's or Queen's Serjeant, (see the discharge of Serjt. Fleming, on being made Solicitor-General in 1595. 3 Nicoll's Prog. Eliz., 370) and in order to avoid this, Shepherd obtained a royal warrant (2 M. & S. 250., 2 V. & B. 422), by which the Attorney and Solicitor-Generals were granted precedence over all the King's Serjeants. (*Ex relatione*, Manning, Q. A. S. And see Whishaw's Syn. of the Bar., XX.)

‡ Per Lord Mansfield, C. J. *Rex. v. Wilkes*, 4 Burr. R., 2,554. But the king may, if he think fit, appoint another to be his attorney.

cutor,* and great state prosecutions, or cases which possess some striking peculiarity, alone call forth his intervention.†

By the common law of England any person may apprehend any one found committing any treason, felony, or misdemeanour; and by the same law any person may apprehend any one whom he has reasonable ground to suspect of having previously committed any treason or felony. In every case the person who is apprehended is to be taken, as soon as reasonably may be, before a magistrate to be examined according to law. In every case of misdemeanour, there is no power to apprehend any suspected person after it has been committed unless by warrant. By the 11 & 15 Vict., c. 42, any person may make a charge of any treason, felony, or misdemeanour before a magistrate, and so put the law in motion against any suspected person. The result of this state of the law is that, practically, nearly every prosecution in England falls into the hands of private persons, and for the most part the injured person becomes the prosecutor, and he is generally bound by recognisance to prefer an indictment and duly to prosecute it; but this imposes no obligation upon him either to employ an attorney or to take any steps towards the proper preparation of the case for trial.

In Scotland, on the other hand, the system proceeds upon the principle that it is the duty of the State to detect crime, apprehend offenders, and punish them, and that independently of the interest of a private party. The Scotch system acknowledges the right of a private party to prosecute; but the duty of the public prosecutor is altogether irrespective of that. The staff of the public prosecutor is as follows:—The Lord

* We remember only two instances on the Oxford Circuit, and in them several indictments had been preferred against the same defendant for totally different offences, and the Attorney-General compelled the prosecutor to elect on which he would proceed; the result was the escape of two gross offenders.

† Formerly every Mint prosecution was conducted under the direction of the Attorney-General; now they are conducted by the Solicitor to the Treasury.

Advocate is the head of the criminal department; under him he has four advocates-depute, and these do the business that a barrister properly does in criminal cases; their duty is to advise in criminal proceedings while they are going on, in the collection of evidence in the country, and when the evidence is completed, to draw up the indictment and to attend the trial, and take the ordinary part in procuring a conviction. The Solicitor-General is also, in his criminal capacity, a depute of the Lord Advocate; he holds a deputation from the Lord Advocate as such. There is a Crown agent, who is the Crown attorney of the Lord Advocate, appointed by him, and subject to his orders, and removable by the Lord Advocate; he is a political officer, and he goes out of office with the Lord Advocate; but the Crown office is permanent, and consists of a considerable number of clerks, who are not changed in practice with the Government. The advocates-depute go out with the Government. So that the political staff substantially consists of the Solicitor-General, appointed by the Crown; the advocates-depute, appointed by the Lord Advocate; and the Crown-agent. The means of detecting and punishing crime in the country consists of the procurator-fiscal; there is a procurator-fiscal for each county, and a procurator-fiscal for some of the larger boroughs. In the counties he is appointed by the sheriff; in the boroughs he is appointed by the town council, but he is directly under the orders of the Lord Advocate and his deputes. The mode in which the system operates is this. The procurator-fiscal receives information that a crime has been committed; his duty is to make immediate inquiry; if any person is suspected, he applies to the sheriff for a warrant to apprehend him, and the party is taken before the sheriff for examination.* Generally, a leading attorney in the county town is the procurator-fiscal. An advocate-depute is attached to each circuit.† The

* Evidence of the Right Hon. J. Moncrieff, Lord Advocate. "Report on Public Prosecutors." Pp. 17, 18.

† *Ibid*, p. 19.

procurators-fiscal and the advocates-depute may decline to prosecute; and if the party thinks he has ground to prosecute, he may obtain the *consensus* of the Lord Advocate so to do; but an instance of a prosecution in that way is hardly known; though instances of remonstrances from private parties, addressed to the Lord Advocate, have been very often known, and sometimes it has happened that the judgment of the advocate-depute has been altered, and the case has been tried; and sometimes the advocate-depute adheres to his opinion, and then the *consensus* is to a prosecution by a private party, of which the Lord Advocate had only known one instance since he came to the bar.* Practically, therefore, all prosecutions in Scotland are conducted from the beginning to the end by officers of the Crown.

Now, a comparison of these two systems leads to the conclusion that both are defective; but that each has some advantages peculiar to it, which may well be introduced into the other. On the one hand, the English system is manifestly defective in leaving it almost to chance whether a prosecution be taken up at all, and, if taken up, whether it be properly conducted. In many cases, the injured party is too poor to employ an attorney to prepare the case for court. In others, there is no person who can properly be called a prosecutor, and this is especially the case when murders have been committed. And lastly, the costs allowed are upon so totally insufficient a scale, that, as a general rule, no pains are taken, between the commitment of the prisoner and the trial, to make the case more complete. The result is, that in England the principal cause of acquittal is the imperfect state in which prosecutions are brought to trial. On the other hand, the Scotch system is open to the grave objection that it takes the case wholly out of the hands of the injured party.

Now, although it be perfectly right that the Crown should have a general superintendence over all criminal prosecutions,

* Report, p. 19.

there can be no doubt that it is very desirable to enlist the cordial assistance of individuals in instituting and conducting them. An injured person is much more willing to do all he can to secure the conviction of the offender where he can control the proceedings, and there are many cases in which a man will trust his own attorney with his private affairs, when he would be very reluctant to allow a public officer to examine into them. Bankers and merchants are very cautious in disclosing their secrets to any one, and if it becomes necessary for them to prosecute, they always prefer their own attorneys; and in many cases these attorneys have a better general knowledge of their clients' affairs than any public officer could acquire for the purpose of any prosecution.

The Scotch system, however, is, in sundry respects, superior to the English. It secures the investigation and preparation of every case before trial by competent persons, a very important matter, in which the English system nearly, if not entirely, fails. Under it counsel are employed in every case, so that every prosecution is properly conducted upon the trial. During the course of a case there may be, and in all important cases there is, a regular communication between the inferior officers and the Lord Advocate; in other words there is a single superintending mind always ready to regulate and guide the action of every inferior officer. By this means there is a very strong tendency to create one harmonious system of prosecution throughout the whole of Scotland.

The question then is, might not such a system be inaugurated as would include all the advantages of both the English and Scotch systems as to these matters, and also get rid of all the defects in each; and it seems clear that that would be practicable. When examined before the Committee of the House of Commons on Public Prosecutors, we proposed the following plan for England. That there should be appointed an eminent counsel in London, who should be the head of the whole criminal procedure in England; not, however, interfering with the rights of the Attorney-General. The officers of the Crown

have already so much pressing business upon their hands that another counsel would be necessary to superintend the criminal procedure, and he must devote the whole of his time to the discharge of his duties. In each county there should be a district officer, who should personally attend the hearing of all the most important cases before the magistrates, such as murder, arson, &c., and superintend the proceedings before them, rendering every assistance in his power to the magistrates, in the investigation of the cases. In all other cases the depositions should be sent as soon as practicable to the district officer. The magistrates, whenever they determined to send any case for trial, should ask the prosecutor whether he intended to employ any attorney, and if he did, should write his name upon the depositions; but if he did not, or there was either no prosecutor or no one fitted to have the control of the case, either from poverty or otherwise, the magistrates should either direct the district officer to appoint an attorney, or should appoint one themselves. The attorney so appointed should not be changed without the leave of the court before which the case was to be tried. In no case should the district officer act as attorney himself. When the district officer had received the depositions, it would be his duty to consider the evidence, and to point out to the attorney engaged in the case any evidence that was superfluous or deficient. And the district officer should render advice to any attorney applying to him for it. In every case where any doubt arose as to the law, which the district officer did not feel competent to deal with himself, he should apply to the counsel in London, and act on his directions. Where any doubt arose as to the propriety of going on with any prosecution, the district officer should submit the case to the counsel in town, and if they both concurred in thinking that the prosecution should be stopped, they might, by writing under their hands, stay any further proceedings, and direct the prisoner to be discharged, and inform the prosecutor and witnesses that they need not attend at the court. But if the prosecutor was dis-

satisfied, he might proceed with the case by the leave of the court, but not otherwise. It should be part of the duty of the district officer to inquire into any defence the prisoner set up before the magistrates, or intended to set up before the court. It should also be part of his duty to attend before the grand jury, and explain to them the charge in the indictment, and take care that all the evidence the witnesses could give was elicited from them. It would depend upon the amount of crime whether a single officer could adequately discharge these duties in a county, and there would be cases where two officers might be necessary. One district officer might very well superintend a large district; but it would be impossible for a single attorney properly to conduct all the prosecutions in a large district. The plan suggested has the great advantages that there would be the constant superintendence of a well-qualified official; that generally the prosecutor's attorney, or some other attorney in the vicinity of the place where the offence was committed, would conduct the case, and would have ready access to and become well acquainted with the witnesses. We are surprised that we do not find any notice of any inconvenience arising in Scotland from one procurator-fiscal and one sheriff acting in all the prosecutions for a whole county. Such a course would be impracticable in our English counties; and, if it were practicable, would be inexpedient; as every one conversant with criminal trials must have felt the great advantage that there is in an attorney being well acquainted with the witnesses, especially where any question unexpectedly arises on a trial, as to which immediate information may be necessary.

Another duty which was assigned to the district officer was to set on foot an immediate inquiry where any great crime was suspected to have been committed. Jervis's Act, 11 & 12 Vict., c. 42, might lead any one to suppose that magistrates can only act upon an information being laid against some particular individual. This seems to be an error; and cases frequently occur where it is highly expedient that an investi-

gation should take place, although no suspicion may attach to any individual; the district officer, therefore, was to have authority to institute an inquiry before the magistrates, and to cause any persons to be examined before them, in order to discover whether any offence had been committed; and, if so, by whom.

The great object of these proposals was that there might be a regular system of superintendence over all criminal proceedings from the first to the last, by a thoroughly competent person, who would look at all the facts of a case with the object of really attaining the truth, and who would not run a headlong course upon the first suspicion, as policemen too often do, and thus lead to the escape of the really guilty. The objection suggested to it was the expense that it would entail. The answer was that at present in England a very great amount of money is entirely thrown away in prosecutions, which fail for want of being properly prepared, and that the certainty of conviction, which would be secured by the proposed system, would have so strong a tendency to repress crime as fully to make up for the additional outlay.

It is clear that this system might, without deranging anything, be introduced in England; as it is hardly anything more than an addition to the present system. In Scotland, however, it would necessitate some alterations. The procurators-fiscal appear to be well prepared by their previous practice to discharge all the duties assigned to the district officers in superintending the conduct of prosecutions. They might well, therefore, be appointed to those offices. It would be necessary, however, to allow the injured party to prosecute wherever he chose in the same manner as in England; but as the procurators-fiscal have become so interwoven in the Scotch system, it is not unlikely that cases might occur in which the prosecutor would prefer that the prosecution should be conducted by them rather than by his own attorney, and possibly it might be the prudent course to allow the procurator-fiscal to act as the attorney in any case where the

prosecutor desired it. Where the members of the community have become habituated to any particular course of practice, it is always desirable in amending that practice to alter it as little as may be, provided the object to be attained is secured. At the same time, it would appear to be more satisfactory that the procurators-fiscal should hold merely the office of superintending other attorneys than that they should act as such themselves, if such a plan could be adopted without exciting the prejudices or feelings of the people. The Lord Advocate does not appear to be so overwhelmed with business but what he can attend to all the criminal matters that may be brought before him; and, if that be so, no fitter person could be suggested for that purpose than that high official. It also would seem to be proper that the prosecutor should be entitled to employ any counsel he thought fit.

Dr. Barclay points out another objection to the Scotch system of public prosecutors. He says—

“In England, where the trouble and cost of prosecution rests on the offended party, there is no provocative to quickness of revenge or the magnifying of small offences. In Scotland we feel satisfied that where revenge can be gratified, not only without cost, but where the offended party is even paid by the public exchequer for his testimony, there is a manifest premium to inform on trifling matters, which had better never have been heard beyond the parties themselves. Where two parties have quarrelled over their cups, whilst discussing some important and vexed question in Church or State, with the known *perfervidum ingenium Scotorum*, they are apt to forget the exact rules of dialectics, and clenching their arguments with their fists, they plant their conclusions on each other's faces, and thus phlebotomise instead of philosophise. The next scene in the drama is the race to the fiscal or nearest police constable. He who reaches first the goal is the injured sufferer, and the witness in the subsequent prosecution, whilst he of heavy weight and tardy heels is prevented from giving evidence to the contrary. In this and similar modes we feel confident that our country has obtained a name we do not deserve for irascible

tempers and unrestrained fists, and thus our assaults and breaches of the peace have formed very ugly columns in criminal statistics. Often, when passions have cooled down, the informer is desirous, when too late, to have the affair quashed. When, at an interval, he gives his testimony, it contrasts greatly with the exaggeration of his information and precognition. He often takes a considerable share of blame to himself, and we have known cases where actually he has volunteered to pay the fine inflicted on the person he so rashly gave up to public justice. A majority of these cases, if left to the parties themselves, would have been most amicably settled when next they met. The effect of such hasty proceedings is likely to place enmity and deadly feud for life between old friends and neighbours, and the man who is obliged to take his place at the bar where thieves and rogues do congregate, even though acquitted, loses respect in his own eyes and caste in the estimation of his neighbours. In the same way there is a strong tendency to obtain some mere question of civil right of property or defamatory charge on character tried at the public expense through some charge of malicious mischief, assault, or breach of the peace. The highly judicious step recently introduced of paying fiscals by salaries has removed the very common insinuation that they had a direct interest to encourage rather than to decrease crime. Nevertheless, there exists the same desire in the public to claim their protection where it costs them nothing, and unless a very paltry case is taken up, these public officers are unjustly exposed to the charge of neglect of duty or partiality in its discharge." *

We confess that this statement surprises us, as we should have thought that where every prosecution is vested in the discretion of public officers, they would have put a stop to all, or at least nearly all, frivolous prosecutions. It has often been urged as a very strong ground for creating a public prosecutor in England, that frivolous and vexatious prosecutions would certainly be put an end to by such an officer.

* "On the Administration of the Criminal Law in Scotland." By Hugh Barclay, LL.D., Sheriff-substitute of Perth, p. 7, *et seq.*

Dr. Barclay's statement, however, shows that in practice that may occur which seemed improbable in theory. In England wherever costs can be granted, they are entirely in the discretion of the court, except in the case of Mint prosecutions conducted by the solicitor to the Treasury; and the costs when allowed are so small that there is no encouragement to institute frivolous or vexatious prosecutions in order to obtain costs; and such prosecutions are extremely rare. It seems clear that it would be right to give the same discretion as to costs in Scotland; but it is obvious that that cannot fairly be done as long as the Crown alone continues to prosecute; for as the Crown has the power to prosecute or not, it is but reasonable that where it compels the witnesses to give evidence, they should be paid at all events, and it is on this ground that in Mint prosecutions conducted by the Treasury the costs are taken out of the discretion of the court.

Dr. Barclay suggests that the court should be empowered in cases where the charge is proved to be wholly unfounded to order the prosecutor to pay the costs;* and this appears to be a very proper suggestion, provided the power be limited to cases where the court is satisfied the prosecutor has improperly instituted or pressed on the charge: whenever full liberty shall be given to the injured party to prosecute, the procurator-fiscal can no longer hesitate to refuse to prosecute; and such refusal would leave it to the injured party to decide whether he would run the risk of prosecuting with the chance of not obtaining his costs.

We will next consider the difference in the systems where a death has occurred. In England a coroner's inquest is invariably held where there are any grounds to suppose that the death has arisen from any criminal cause. The court of the coroner is a court of record, at which the coroner is the judge, and the coroner's inquest is a preliminary investigation only, and consequently the coroner may, in his discretion, direct the

* Barclay, p. 9.

removal of any person whose presence he may think prejudicial to the ends of justice (*Garnett v. Ferrand*).^{*} In this case Lord Tenterden said—

“The court was assembled for an inquest on the view of a body of a person then lying dead. Now it is obvious that such an inquiry ought, for the purposes of justice, in some cases to be conducted in secrecy: it is a preliminary inquiry, which may or may not end in the accusation of a particular individual, it may be requisite that a suspected person should not in so early a stage be informed of the suspicion that may be entertained against him, and of the evidence on which it is founded, lest he should elude justice by flight, tampering with the witnesses, or otherwise. . . . It was admitted in the argument that secrecy and exclusion may be proper and necessary when charge and accusation begin. It is obvious that this may begin as soon as the evidence begins. Cases may also occur, in which privacy may be requisite for the sake of decency; others, in which it may be due to the family of the deceased. Many things must be disclosed to those who are to decide, the publication whereof, to the world at large, may be productive of mischief without the possibility of good.”

In practice, however, the public are generally admitted to a coroner's inquest.

In Scotland the inquiry in case of a death is made privately by the procurator-fiscal, under the superintendence of the sheriff.†

In consequence of a well-known trial for murder by poison from the west of Scotland, where it was said that the want of a public investigation was much felt, instructions were issued by the Lord Advocate, which were embodied in general orders in 1858 and 1859; by these the fiscal is to inquire, first, in all cases of death from accident; second, in all cases of sudden death; and, third, in all cases of discovery of a dead body. After inquiry, it rests with him whether he shall have a medical report, or take a formal precognition. In

^{*} 6 B. & C., 611.

† Barclay, p. 10.

Scotland the inquiry is made in private, and the witnesses are not examined on oath, unless in very rare instances, where a person is suspected of concealing the truth.*

"In Scotland," Dr. Barclay says, "one defect is, that if the investigation terminates in no proceedings against any individual, then the grounds on which this determination has been taken are unknown. To avoid this it is of frequent occurrence that persons are put on their trial under a charge of culpable homicide, sometimes even of murder, when it is notorious there is no expectation of obtaining a conviction. But the person is put upon his trial merely to satisfy the public by proving his innocence. In such cases it is openly stated that such harsh proceeding is taken because of our having no coroner's inquest."†

Now we are satisfied that a coroner's inquest in the present state of things in England is a very mischievous institution; and ought to be abolished.

As we have already seen, a coroner's inquest is a mere preliminary inquiry in cases of murder and manslaughter, and a worse could not be excogitated. There is no qualification required for the jurymen, and their selection falls commonly to such incompetent persons as parish constables and beadles, who are apt to consider less the qualifications of the individuals whom they summon, than their willingness to serve.‡ The choice of the place where the inquest is held ordinarily rests with the constables and beadles, who generally select public-houses, where the proceedings, unless there are some circumstances of notoriety in the case, are almost entirely withdrawn from public observation.§ There is no one to conduct the proceedings before the coroner, and consequently he generally calls and examines the witnesses. This is open to two objections; the want of a proper person to conduct the inquiry, and the inconsistency of a person, who is to act as judge, performing that duty. Then no person is under a charge during

* Barclay, p. 11. † *Ibid.*, p. 12.

‡ Report of Committee of Middlesex Magistrates, 1851, p. 54.

§ Barclay, p. 56.

the inquiry, and consequently no one has a right to cross-examine any witnesses, or to call any for his defence; but the matter altogether rests with the coroner and the jury. It is easy, therefore, to understand that the committee of Middlesex Magistrates might well be satisfied that coroner's juries very rarely afford any assistance towards the prosecution of the inquiry, whilst they frequently, by misplaced interference and irrelevant questions, impede and protract it.*

As an instrument, too, of criminal procedure, it is equally superfluous and unsatisfactory. As all cases of murder and manslaughter are usually investigated by the magistrates, and a bill of indictment is always sent before the grand jury, the case is investigated three times over before it comes to trial, to the great inconvenience of all the witnesses, and to the great risk of the credit of the witnesses being impeached by the variances which may occur in their depositions before the coroner and the magistrates.† The number, too, of cases in which verdicts of murder or manslaughter are found is infinitesimally small. In 1849, out of 2,674 inquests in the county of Middlesex, these verdicts (including those returned against "persons unknown") were 36 only; viz., 18 of murder, and 18 of manslaughter; and, taking the average of the last ten years, the number of such verdicts was less than one and a quarter per cent.‡ Well might the committee say—"If, then, the coroner's jurisdiction were to be regarded simply as an instrument for the detection of crime, the extent of its exercise must be looked upon as out of all proportion to the results arrived at, even leaving out of consideration the fact that the same results are, in almost every instance, simultaneously effected by other means, and would, therefore, have stood no risk of failure, if the coroner's authority had not been put in force."§ This disproportion also proves that in a large number of cases

* Barclay, p. 54.

† We have known one case at least where these variances threw considerable difficulty in the way of the prosecution, and this was entirely owing to the careless manner in which the depositions had been taken.

‡ Barclay, p. 45.

§ *Ibid*, p. 46.

the inquest must have been unnecessarily held; and consequently that there has been a useless waste of public money, and very probably no small annoyance to the family of the deceased. Another inconvenience in these inquests is, that it frequently happens that they close their proceedings before the case has been thoroughly investigated, and return what is called an open verdict, leaving the case to be investigated by the magistrates.

The coroner has only jurisdiction *super visum corporis*; if, therefore, the body be not forthcoming, or if it be in such a state that it can afford no evidence to the jury, the coroner has no jurisdiction, and the case must be investigated by the magistrates. It would be difficult to assign any reason for this distinction except this, that formerly an inquisition must have described the wounds, and therefore the jury were required to view the body, in order that they might describe them. This, however, is no longer necessary, and its origin, no doubt, was at a time when jurymen were considered to be witnesses.*

Another objection to inquests is the trouble they impose upon witnesses and jurymen, especially where adjournments are necessary, and the double expense of attending before the coroner and magistrates.

As to the working of this tribunal, it is impossible to conceive any tribunal that works worse in practice. We have for years past watched the cases reported in the papers, and the number of tortiously wrong verdicts is very great indeed.

* In Jervis' Coroners, p. 29, it is said that "if the body be not found, or have lain so long before the view that no information can be obtained from the inspection of it, or if there be danger of infection by digging it up, the inquest ought not to be taken by the coroner unless he have a special commission for the purpose; but application should be made in such cases to the magistrates or justices authorised to inquire of felonies, &c., who, without viewing the body, shall take an inquest by the testimony of witnesses." Citing 5 Rep., 110; 2 Roll. Abr., 96.; 2 Hawk., P. C., c. 9., s. 23; 2 Lev., 140. The passage is taken almost word for word from Hawkins, and it admits of doubt whether it is strictly accurate, as the authorities cited appear to refer to inquiries at the assizes and sessions by the grand jury. Thus, in 2 Lev., 140, it was held that the death should be presented at the next assizes at York, and the inquisition traversed and tried at those assizes.

In that large class of cases, which includes what are too commonly designated accidental deaths, a right verdict is quite the exception, and a wrong verdict the rule. Nothing is more common than for the verdict in these cases to be "accidental death," with an expression that there had been carelessness or negligence, which plainly shows that, if the jury had known what their real duty was, the verdict would then have been manslaughter.

This is particularly the case in deaths caused by reckless and furious driving. More than two hundred persons were killed last year in London in these cases, and, if we err not, there were only two or three verdicts of manslaughter returned by coroners' juries, although there is no doubt that a very large portion—probably at least a third—were really cases of manslaughter. In fact, in these cases both coroners and juries seem either incompetent to understand the law, or to deal with the facts. Again, in cases of railway accidents, it would be difficult to discover any tribunal more thoroughly incapable of dealing with them.*

Another serious objection to this tribunal is the reckless way in which coroners and their juries occasionally transgress the bounds of their jurisdiction, and level their censures at persons who have no means of defending themselves. The consolation in such cases is the low estimation in which such tribunals are deservedly held.

In *R. v Medhurst*,† Lord Campbell (then at the bar) said—

"For the deliberate verdict of twelve Englishmen on their oaths, after listening to a sound exposition of the law, I have the most

* A stronger instance could hardly be adduced than the verdict in the Welwyn tunnel accident. There one train broke down in the tunnel, and the guard, in violation of his duty, neglected to go back and give the proper signals. The signalmen at one end of the tunnel or at the other neglected to give, or to attend to, the proper telegraphic message; and they flatly contradicted each other. There was no doubt, however, that the guard and one signal-man were guilty of negligence, and yet the jury, because they could not tell which of the signalmen was in fault, returned a verdict of "accidental death."

† Lord Campbell's Speeches, p. 35.

unfeigned respect ; but for the inquest of a coroner's jury in a case of sudden death, I have no respect at all. The constable gets together whom he can first find, no qualification being required of the jurymen. They meet amidst the fumes of an alehouse. Whatever rumours have been spread in the neighbourhood respecting the fate of the deceased and the supposed murderer, they have heard, and the more horrible and improbable such rumours are, they are more apt to believe them. To calm their imaginations, they are by law required to view the body, with its convulsed countenance and ghastly wounds, before they begin their investigation ; and the coroner, who ought as a judge to explain to them nice legal distinctions, and to enlighten their understandings, may be a low legal practitioner, unqualified for such duties, or a person wholly uninitiated in the law, who has been elected to the office by popular arts, and who seeks to inflame the prejudices of the jury, instead of allaying them. In extenuation of the recklessness with which a verdict of wilful murder may be pronounced by such a tribunal, I should mention that the jury and the coroner are not aware of the solemnity or consequence of the act about which they are employed. Nor is this to be wondered at, for I believe I may positively assert that in the annals of the administration of criminal justice in this country, there is not a single instance of a conviction for murder on the finding of a coroner's inquest."*

However strong these observations may be, cases do sometimes unfortunately occur, to which these or even stronger observations may be applicable. It became Lord Campbell's painful duty, whilst he was Chancellor, to remove a coroner for drunkenness and improper conduct at the holding of an inquest.†

We think it will surprise not a few persons to learn that

* A bill of indictment is almost always preferred, and if it is ignored, the regular course is to take an acquittal, as the determination of the grand jury is considered of higher authority than the verdict of a coroner's jury. The cases in which a trial takes place on a coroner's inquisition, are generally where it has been returned after the grand jury have been discharged. As far as we are aware, a conviction never took place in such a case, the inquisition generally, if not invariably, being held bad.

† *Re Ward*, 4 Law T., 458.

the salaries to be paid to the coroners for Middlesex (exclusive of the city of London) will amount this year to no less a sum than £4796. 11s. 9d.* These salaries are fixed under the 23 & 24 Vict., c. 116; by which the salaries were to be not less than the average amount of the fees, mileage, and allowances actually received for five years before December 31, 1859, and after the lapse of every successive five years, the salaries might be revised, having regard to the average number of inquests in the five years immediately preceding; and under this latter provision the salaries in question are fixed; but the committee could not close their report—

“Without expressing the strong objections they feel to the payment of judicial services by a fixed fee for each case, and especially where it is in the power of the judge to increase or diminish the number of cases almost at his own pleasure, and without any practical safeguard being provided against unnecessary inquiries. It is not fair to the judge himself that such an inducement should be offered to him to hold needless inquests, or that he should be exposed even to the suspicion of doing so. It is unjust to the rate-payers, for it imposes upon them a burthen regulated almost by caprice, and from which they have no appeal. It is contrary to the practice of the entire judicial system of the country, which pays the judges a fixed salary, not measured by the number of cases adjudicated, the country thereby retaining their entire services. Nor does it appear to your committee that the office of coroner is one entitled to an endowment considerably greater than that allotted to a county court judge or a police magistrate (one coroner's salary is £2,057, another £1,606). This appears to your committee to be the more unjust, because the coroner is now permitted to perform much of his work by deputy, the result of which is that whilst the county pays to the coroner a handsome fee for each inquest, because it is assumed that a man of superior attainments is required for the office, and should be paid accordingly, in practice a great proportion of the inquests are held by the deputies, who only receive a small propor-

* Report of Select Committee of Middlesex Magistrates, April sessions, 1866 p. 13.

tion of the fees actually paid by the county to the coroner for holding those inquests ; and your committee must submit that if men can be found to act as deputies and hold inquests at the lesser fee, the rate-payers should reap the benefit, and proportionately lessened salaries be paid to the coroners." *

In the year 1865, the costs paid in Middlesex, in addition to the coroner's salaries, were £7,933 1s. 10d. so that, assuming these costs to be the same this year, the whole expense of salaries and costs will be £12,729 13s. 7d.

The Middlesex magistrates' letter to Mr. Waddington, in April, 1861, anticipated the effect of the 23 & 24 Vict., c. 116. They say :—

"Under the Act of last session, whilst on the one hand every coroner is made the sole and final judge of the cases in which inquests are to be held ; on the other hand, it appears to have been the intention of the Legislature that the greater number of the inquests which now and up to the end 1865, may be so taken, the larger, without reference to the necessity of such inquests (which the Act provides no means of inquiring into) shall be the coroner's salary. It will be extraordinary if, under such circumstances, the number of inquests held during the time referred to does not exhibit, throughout the country, a marked increase."†

The largest number of inquests in any of the five years before 1860 was 2,602 ; last year the number was 3,690, an increase of 1,088 ; the average of the five years before December, 1859, was 2,388 ; the average of the last five years was 3,335—an increase of 947. So that Middlesex has verified the prediction most completely. In Middlesex the beadles are allowed a shilling for giving notice of a death, and seven-and-sixpence for summoning the jury ; so that they have a direct interest in increasing the number of inquests ; but the police receive no allowance, unless they are witnesses in the

* Report of Select Committee of Middlesex Magistrates, April sessions, 1866, p. 13, 14.

† Correspondence, p. 22.

case. Whether anything accrues to the beadles from the patronage of particular public-houses is by no means clear.

In Scotland the only amendment required seems to be simply to vest a discretion in the sheriff whether the investigation be conducted publicly or not. And in England the only change necessary is the abolition of coroners' inquests, and the declaring, what we conceive is really the law, that magistrates may investigate any case where there is a suspicion of any crime having been committed, although there may be no one charged with it. In England justices have jurisdiction to investigate the charge of every criminal offence, and coroners have only jurisdiction to inquire into cases where death has occurred. (*Reg. v. Herford.*)* As the investigation of every criminal case by justices is perfectly satisfactory, there is no reason whatever why in the solitary instance of death occurring there should be the additional investigation by the coroner. If a man is wounded till he is on the very brink of death, the magistrates alone can examine into the case, and it would be difficult to assign any reason why the mere fact of death should render an inquest either necessary or advisable. Cases have sometimes occurred where the magistrates have examined and committed a person for wounding with intent to murder, and afterwards the wounded man has died, and then a coroner's inquest has been held. There can, therefore, be no valid reason why magistrates might not have the sole power to investigate all cases where death has occurred, and if there be any doubt as to their power either to investigate a case where no one in particular is charged, or in any other respect, let it be declared that they have such power, and let them be invested with all other powers to enable them to carry out the inquiry satisfactorily.

There are several reasons that may be adduced in addition in favour of this change. The first is in the cases mentioned by Lord Tenterden, where privacy may be requisite for the sake

* 3 E. & B., 115.

of decency ; others where it may be due to the family of the deceased. Here it is plain that privacy not only may, but, probably will, be better secured by an investigation in private by magistrates than before a coroner's jury, and it is impossible to doubt that magistrates are infinitely better judges of what is decent and fitting in such cases than any coroner's jury.

Then, as Lord Tenterden said, cases may occur where it may be desirable that a suspected person should not in so early a stage be informed of the suspicion against him, and of the evidence on which it rests ; and it is much less likely that magistrates should permit these things to transpire. We remember two very remarkable cases, in which the murderer attended the inquest ; in one he discovered that he was suspected, and made his escape.*

Again, neither coroner nor jury has any authority by virtue of their office to apprehend any one until a verdict has been given ; but magistrates may at any time apprehend any one upon suspicion alone.

Lastly, the vast saving of expense that would be caused by such a change affords a very strong ground for it. We have seen that in Middlesex the salaries of the coroners will in this year amount to the enormous sum of £4,796 11s. 9d. ; and the other expenses to the sum of £7,933 1s. 10d., making a total of £12,729 13s. 7d,

Now if coroners' inquests were abolished, the large sum saved might, after furnishing fitting retiring allowances to the coroners, be devoted to the salaries of so many district officers as would efficiently superintend all the prosecutions in Middlesex, and leave a large balance besides. And no one can doubt that if such officers were appointed, a great increase of security to life, person, and property would be the result.

* There seems sometimes a sort of fascination by which the murderer is attracted. In Derbyshire one Webster poisoned a person, and was quite unsuspected ; but he volunteered to attend the funeral, and was taken with such a shuddering in church as led to his being suspected and convicted.

"One most important distinction exists," says Dr. Barclay, "between the practice of England and Scotland, with reference to what is called the declaration of the accused. The accused party is brought up under a warrant for examination (in Scotland). He is examined in private, being previously denied all access to friends or agents. The magistrate, (sheriff or deputy-sheriff), is bound to tell him the charge, and to mention that he is not obliged to answer any questions or make any statement; and whatever he does say of his own free will is to be taken down in writing, which may be read over as evidence against him at his trial. There is a difference of practice as to stating the charge. Some magistrates read over to the accused the charge as contained in the prosecutor's petition; others state it specially, but some carelessly state it in general terms, as theft, assault, or other crime without any specification. The procurator-fiscal then puts the questions from the information or precognition, and frequently the questions are put in a leading manner, showing the accused that the whole affair is known to the authorities, and thus it is needless to deny the matter. The declaration is of necessity taken down more in the language assented to, than by any actual statement by the prisoner. It is easy to perceive how a timid person may thus be completely led into statements which he really did not mean, and which are not consistent with the fact. After the declaration is taken, the accused may be committed for further examination, and under this warrant detained in prison, without right to demand bail in bailable offences, and without permission to be visited by friends or agents. The period of this secluded imprisonment, unfortunately, has not been fixed by statute, but in custom has been held to extend to eight days, a term much too long, where the person may ultimately be liberated without committal for trial. A second, and even a third, declaration may be taken, in which case the previous declarations must be read over and the caution repeated. But the unfairness of these declarations remains to be seen at the trial. The prosecutor uniformly libels the declaration as to be used in evidence against the accused; for which purpose it is lodged with the clerk of the court previous to trial, that it may be seen by the counsel or agent for the accused. But nevertheless, it is in the power of the prosecutor to produce it to the jury or to withhold it. The declaration must either be admitted,

or proved by two witnesses to be that of the accused, freely and voluntarily emitted after the usual caution given. If, at the close of the examination of the witnesses, it appears that the declaration is thereby contradicted, the prosecutor generally asks it to be read to the jury. If, on the contrary, the statement given by the prisoner is thereby borne out, then it is withheld, and the accused cannot call for it. If the accused avail himself of his privilege and decline to answer questions, then the empty declaration, if such it can be called, is read, with the comment that no innocent person would refuse to answer questions. If he does answer questions, then his contradictions are pointed out, and even the very words are criticised, with a minuteness more applicable to a literary production, than a mere statement of a criminal. It is said, and doubtless with some force of truth, that the declaration is found useful in leading the precognition to show the innocence of the party by tracing out the story he tells, by further precognition; but if it be so intended, why should it be withheld from the jury in any case? It is said that though the prosecutor gives a list of witnesses, he is not bound to call and examine them all, but may select those he pleases, and he may deal in the same way with the declaration of the prisoner. But the answer is obvious. It is in the power of the accused to call in exculpation any of the witnesses on the Crown list, and why ought he not to have the same advantage with the declaration, which has been libelled to be brought as evidence against him? The contrast of the English practice with ours is more favourable to the humanity and fairness of our southern neighbours.”*

“Fortunately, our law, with some appearance of inconsistency, distrusts the declaration; and therefore, though that writing may contain a full confession of the crime, unless it receives corroboration by witnesses, it is justly rejected by both judge and jury; and it is now not uncommon to hear of verdicts of acquittal where the pannel admitted the offence fully in his declaration. Nevertheless, it is well known that in cases of doubtful evidence, the statements of the accused in his declaration go far to influence the jury.”†

A single case, and that one of the most remarkable and

* Barclay, p. 21 *et seq.*

† *Ibid*, p. 25

important that was ever tried, will prominently bring into view the mischievous tendency in some respects of the Scotch system in the private interrogation of the accused. In July, 1862, Jessie M'Pherson, the servant of John Fleming, of Sandysford Place, Glasgow, was found murdered in the bedroom she usually occupied. There could be no doubt upon the evidence, that James Fleming, the father of John, and Jessie M'Lachlan, were in the house on the night in the course of which the murder was committed, and the main question was, which of them committed the murder? James Fleming was first apprehended and examined, and was afterwards discharged; but Jessie M'Lachlan did not know of his discharge until all her examinations had been taken. Jessie M'Lachlan and her husband were also apprehended. Both husband and wife were examined separately upon the charge of the murder in the usual way, the husband being examined first. The examination of Jessie M'Lachlan lasted between three and four hours. The procurator-fiscal asked the questions; as far as the sheriff substitute thought them proper he allowed them to be put, and dictated the answers to a clerk.*

The husband was liberated immediately after the wife had been examined. Some articles which had been taken from the house on the night of the murder were afterwards found, and the wife was then examined again, and some interrogatories were put before the articles were shown to her. And she was afterwards examined a third time. The first examination was written on 24 pages; the second, on 12 pages; and the last on three pages. The wife was afterwards indicted for the murder, and (according to the Scotch practice) for stealing a quantity of the clothes of the deceased, and some plate and plated articles belonging to John Fleming; and

* These statements of the facts are taken partly from the *Caledonian Mercury*, which contained in many respects the most accurate report; and partly from "The Sandysford Murder Case," with portraits, printed at Glasgow, by J. H. Hastings, which, we believe, was reprinted *verbatim* in the Report presented to the House of Commons, with the omission of the speeches of counsel, and the summing up of the judge.

upon her trial it was objected that these examinations were inadmissible, and *Reg. v. Agnes Kelly** was relied upon as an authority precisely in point. In that case three long examinations had been taken, and new questions put upon matters discovered after the previous examinations, and the Lord Justice Clerk said—

“That the matter was to his mind most unsatisfactory. That he considered the extent to which the pannel had been examined was a very great abuse of the objects for which a party accused was brought before a magistrate for a declaration : and that it was pretty plain that the second and third declaration had been taken not for the purpose of allowing the party to give any explanation which might be material, but with the direct object of skilfully rearing up evidence against her by questions founded upon inquiries obtained in the interval, and by leading her at a great distance of time into answers upon matters which she, if innocent, might think quite immaterial, and upon which the procurator-fiscal had obtained information between the examinations. That he saw little difference between such a system and the practice in France of subjecting parties accused to an examination upon every point in the whole case, except that in the latter it was done in public, and with great securities. That there was no equality between a procurator-fiscal, with all the alarm of imprisonment and the authority of a magistrate, and the terrors of an accusation to back him, and a poor countrywoman of 55 years of age, a common farm servant, uneducated and illiterate, if such an encounter of wits was to be permitted : that he thought the whole purposes and objects of taking a declaration from the accused had been overlooked.”†

However, the objection was overruled and the declarations admitted.‡

Now it is quite beside our present purpose to consider

* Brown's Report, p. 543.

† Report to the House of Commons, p. 61.

‡ On the subsequent investigation, Mr. Wilson, one of the prisoner's attorneys, protested against that investigation being conducted or controlled by the same officials, or either of them, by whom the case as against the prisoner was got up, and whose conduct in the whole matter he had disapproved. Report, p. 77.

whether this decision was right or not; for we are objecting altogether to the interrogation of the accused in secret.

But let us briefly contemplate the position in which Jessie M'Lachlan, according to her own last statement and the evidence, stood. She stated her presence at the time the death wounds were inflicted by old Fleming.

'I was terrified, because I was in the house and saw the body lying there, and myself connected with her death. He said, 'my life is in your power, and yours is in my power; but if both of us would keep the secret, it never would be found out who did it, and that if I would inform on him, he would deny it, and charge me that I did it. He said it was as much as our lives were worth if either of us should say a word about it.' I beseeched and begged of him to let me go away, and I would swear never to reveal what I had seen in case of being taken up for it myself as well as him."

Old Fleming, Jessie M'Lachlan and her husband, are all apprehended upon the charge of murder, and then Jessie is placed in a room, with the sheriff-substitute presiding, and subjected to the examination of the procurator-fiscal on the part of the Crown for between three and four hours, who asked all questions so far as the sheriff-substitute allowed him; no attorney or friend of the prisoner was present. The questions and answers were not taken down; but the sheriff-substitute dictated from the questions and answers what the clerk should take down. Now is it possible for any one to maintain that such an examination, so taken and under such circumstances, was in accordance with the principles of justice? The interrogation may have been, for aught we know (and the form into which the statement is put prevents any one from being able to know), strictly according to the Scotch practice, but can such a practice in such a case be otherwise than a mockery, rather than an administration, of justice? The great end to be obtained by judicial proceedings is truth; can such an inquiry have any tendency to elicit the truth? On the contrary, has it not a direct tendency to produce falsehood?

Might not poor Jessie M'Lachlan, in the position in which she was, well have exclaimed, like the hapless lady of old—

ἄι, ἄι, στέγαι, στέγαι,
φίλων ἔρημοι, τῶν δ' ἀπολλύντων πλέαι?

No one would venture to say a word in favour of torturing the body of a prisoner; but why not? Because the natural tendency of the sufferings of the body is to overcome the firmness of the mind, and to induce the prisoner to confess what is false.* But who will venture to say that poor Jessie M'Lachlan may not in mental "suffering" have "felt a pang as great" as any "corporal suffering" could produce? Her statement, elicited by the interrogation she underwent, was undoubtedly false; is it unfair to attribute that falsehood to the pressure of the interrogation under the circumstances in which she was placed? We are told that the average number of convictions in Scotland is much greater than in England; we can well believe it. It is difficult to perceive how any one can have a chance of escape if interrogated like Jessie M'Lachlan, unless, indeed, the jury have the good sense to disbelieve a prisoner's statement, as Dr. Barclay says they frequently do. And if that be the case, and it be also the fact, as stated by Dr. Barclay, that a prisoner's confession, unless it receives corroboration by witness, is rejected both by judge and jury,† it would be difficult to discover a stronger practical condemnation of the procedure in question, or a more conclusive proof of its uselessness.

We are very far from saying that the preliminary examina-

* The confessions of the supposed murderers of Darnley, elicited by torture, have never, as far as we are aware, been duly canvassed. The very foundation stones of the house where Darnley was were blown into the air, which could only be effected by an explosion of powder *below* them. The statement, therefore, that the house was blown up by bags of powder carried into the house, and laid on the floor of the room below Darnley's room, must be false, and the inference is very strong that the house had been mined before Darnley went into it. We hope the next writer on this murder will consider this point fully. Its elucidation might throw much light on this mysterious murder.

† Barclay, p. 25.

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tions in Jessie M'Lachlan's case are such as are generally taken in Scotland; on the contrary, we have reason to believe that they were highly disapproved even by Scotch officials, and that the practice in other places is not only much more agreeable to the dictates of humanity, but sometimes even errs on the other side, and prevents a prisoner from uttering a statement, which he is perfectly ready to make. Both these extremes are erroneous, and tend to the perversion of justice.

It is urged, however, not unfrequently, in favour of this system of private interrogation, that an innocent person can never be afraid to tell the truth. The answer is that this is by no means universally true. Suppose a husband is taken up for a crime committed by his wife; * will not the husband be afraid, and ought he not to refuse, to tell the truth which goes to criminate his wife? †

Suppose a man tried for a capital offence of which his brother was guilty; will he not fear to tell the truth lest he may cause his brother to be hanged? We remember a very remarkable case where one brother was tried for a rape committed by another brother, and risked his life sooner than tell what would have saved himself at the peril of his brother's life. But to put still more conclusive cases. In the strange circumstances of this life, how many instances occur where if an innocent prisoner told the truth he would be fixed with having been at the place where the crime was committed, whilst he would have no evidence to exonerate himself, and his assertion of his innocence would probably avail him nothing. This case is stated by Sir F. Kelly:—‡

Three men, with others, were drinking at a public-house; the deceased and the prisoner quarrelled, and the deceased threw a pint pot at the head of the prisoner, who started up

* *Ex gratiâ*, in Jessie M'Lachlan's case her husband was taken up and examined, although clearly innocent, and she had given him some of the articles she had taken.

† Our law would not allow him on oath to prove it, but it seems the Scotch law does allow him to state it privately.

‡ Report of Capital Punishment Commission, p. 129.

and swore he would be the death of him; the deceased ran out of the house, and ran away, pursued by the prisoner, and followed (though not noticed at the time) by a third. The prisoner overtook the deceased, and knocked him down, and then left him. The third man then went up, and stabbed the deceased and robbed him of a sum of money he knew he had in his pocket, and then ran off. He was not seen by the prisoner, who having heard the cries of deceased returned after the third man had gone, and rendered all the assistance he could to the deceased, and so got blood on his clothes; but finding he could not save the man, he became terrified, and ran away.*

Now suppose in this case the prisoner had told all he knew, can any one doubt that the jury would have convicted him? And might he not well have feared to tell the truth?

One Williams was tried at Monmouth for murder. He had been at a public-house with a gun, which he there loaded, and said he was going to his land to watch for poachers. The deceased was found lying with his head beaten almost to pieces under a rick on the prisoner's land, and parts of the prisoner's gun lying near. The prisoner's statement contained in his counsel's brief was that he had gone to his land, and when getting over a gate into it, a dog flew at him from under the rick; that he shot at the dog and his gun burst, and the stock was broken off. That the dog still continued attacking him, and that he seized the stock and struck at the dog, which retreated under the rick, and he kept striking at it, and if he had ever struck the deceased, it was accidentally in the dark of the night; for he never perceived the deceased till he had given over striking. Might not the prisoner well fear to tell such a story, though it was true? †

* The third man was afterwards convicted of a capital offence, and confessed how he had committed this murder.

† We were counsel for the prisoner, and on full consideration his attorney was directed to tell the prisoner that it was a most perilous defence to make, but that if he persisted in alleging it to be true and wished it to be made, all should be done to support it. The case was tried before counsel

It has been suggested to us by a very able official in Scotland, that there are cases where it may be material to the prosecution, and no injustice to the prisoner, to put special questions; for instance, where a prisoner is found in possession of stolen goods, and denies the theft, may he not properly be asked where he got them from? The answer is, the rule of law is that if a prisoner is found in recent possession of stolen goods, the jury are directed to presume that he stole them, unless he show the contrary. The question, therefore, is not necessary for the purpose of assisting the prosecution to prove the theft. And if it be desired to be asked for the purpose of investigating how the prisoner otherwise became possessed of them, this may be ascertained from the witness whose name the prisoner must, in Scotland, give in due time to enable the prosecutor to make the inquiry. The insuperable objection to the asking such a question is, that it has a direct and almost universal tendency to lead the prisoner to make a false statement. Jessie M'Lachlan's case is only one out of numbers of

could address the jury for the prisoner, and therefore he was informed that he must tell the jury his story himself. The case for the prisoner was conducted on the assumption that the story was true, and the facts elicited in cross-examination strongly helped to confirm the story. The gun was broken and had burst as described; the dog was hit with shot all over the breast, but not so severely as if it had been shot by a gun that was discharged so close and had not burst; the dog was found crouched under the rick, and close behind the head of deceased; the deceased was lying lengthways by the side of the rick, with his head towards the gate, which was only five or six yards off, and quite in the gloom, so that a person might not see what the head was, or even see it. There had evidently been no struggle, as there were no marks of violence on any part except the head. Dirt from the ground had been driven into the head by the blows inflicted upon it, and the surgeon admitted that the facts were quite consistent with the deceased having been lying on the ground in the place where he was found when the blows were struck. When called upon for his defence, the prisoner made the same statement that he had made to his counsel, in a simple, artless manner, and the result was an acquittal. This case has been thus stated not only on account of its being a very extraordinary one, but because it is an instance of the course which, upon full consideration, we are satisfied ought to be adopted by a prisoner's counsel. He has no right to set himself up as a judge as to the truth of a prisoner's story; but it is his duty to point out to a prisoner the peril in which he may be placed by adopting a certain line of defence; if, however, he persists in desiring it to be adopted and affirms it to be true, then it is his counsel's duty to conduct the defence accordingly.

cases which show that this is the general tendency; indeed, in England, even where no such question is put, the almost invariable effect of fixing a prisoner with the possession of stolen property, is that he volunteers some false statement as to the mode in which he became possessed of it. Another case put is where the defence is an alibi, and it is asked, is there any objection to asking the prisoner where he was at the time? as he must, in Scotland, allege the alibi, and give the names of the witnesses to prove it, there can be no need to put the question. We are altogether adverse to putting any questions to prisoners, unless it be for the simple purpose of enabling them to explain any imperfect statement that they may have volunteered. The position of a prisoner charged with a crime, possibly murder, is one which may very reasonably be looked upon as a state of mental duress, and it is very unreasonable to subject a person in such a position to any interrogation, and the more so, as he has no previous knowledge of the facts as to which he may be questioned, and no time to consider how the questions ought to be answered. If any one has had practical experience of the difficulty there is in eliciting the whole truth from a witness who has not been previously examined, although such witness is perfectly free and unembarrassed, he will feel how dangerous a proceeding it would be to interrogate a person labouring under the pressure of being charged with a crime; and, possibly, this pressure would even operate more strongly upon the mind of an innocent than a guilty person. For an attentive observation of the conduct of prisoners on their trials leads to the conclusion that the innocent are often much more unnerved by their position than the guilty. Another serious objection to questioning prisoners is that the questioner puts the questions for his own purposes, and even if he be perfectly fair, he may elicit what bears against a prisoner, without, at the same time, eliciting what may place the matter in its true light. He cannot know the facts which are within the prisoner's knowledge, and which would clear up his statement, and therefore,

can only accidentally ask a question that may elicit them. Anyone who has noticed how different the evidence of a witness often appears at the close of the re-examination from what it did at the end of his cross-examination, will fully appreciate these remarks, especially when he reflects how wholly incompetent the lower orders commonly appear to be to set any statement they may have made against themselves in a different light by any further explanation.

In England, after the witnesses for the prosecution have been examined in the presence of the accused, their depositions are to be read to the accused, and he is to be told—"Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial." The justices are also to tell the accused that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of guilt. If the prisoner then makes any statement, it is to be taken "in his very words, as near as possible." The precise words to be addressed to the accused were specified in consequence of the frequent rejection of statements made before magistrates on the ground that the words addressed to the accused might have operated as an inducement to confess,* and as the form of the statement given by the statute contains the caution, it seems well calculated to secure the object for which it was introduced. This procedure leaves the accused perfectly at liberty to say anything or nothing, and no inference can be drawn from his silence; and if he have any real defence, he may make it, if he thinks fit, in his own way, without being questioned at all. There can be no doubt that this system is substantially more just than the Scotch system,

* The Irish Act, 14 & 15 Vict., c. 92, s. 14, does not specify the particular words to be used, but merely requires the prisoner to be cautioned that he is not obliged to say anything unless he desires to do so, &c.

and that it is expedient that a similar system should be introduced into Scotland.

After the defendant has been privately examined in Scotland, the Lord Advocate tells us that, if there appears to be ground for an immediate warrant to commit, he may be committed at once. The usual course is to commit him for further examination, and then the procurator-fiscal takes what is called a precognition, that is to say, he examines the witnesses whom he can discover, not publicly but privately; they are not properly depositions, but they are statements taken down by the fiscal and signed by the witnesses; and if the case is at all of importance to warrant it, he sends the precognition to the Crown agent. The witnesses may be examined on oath, but this is not usually done, unless the witness is reluctant.* The accused is not entitled to have a copy of the examinations of the witnesses, nor to be present when they are examined, nor to have any one attend on his part to put questions, nor to cite witnesses in exculpation.† He is, however, entitled to see by himself or his agent and to precognosce (examine) the witnesses for the Crown.‡

Jessie M'Lachlan's case will also show how very ill this system works. On the part of the prosecution the motive suggested for the commission of the murder was that the prisoner being in debt for rent and very poor, had killed the deceased in order to steal a small quantity of plate and plated articles. The precise value of the articles did not appear, but they had been pledged for £6 15s. The prisoner had formerly lived in Fleming's service, and knew what plate he had, and that it was kept in a sideboard in the dining-room. Upon the trial not a word was said of any plate other than that which was pawned. But when Mr. Young investigated the case after the trial, Jeffery, a police officer, was asked the following questions and made the following answers.

* Public Prosecutors, p. 18.

† Alison, p. 739.

‡ Alison, p. 535.

" 'When he (Mr. Fleming) showed you into the sideboard, did he show you a silver tea-set that had been left there ?'

" 'Yes ; there was a good deal of valuable stuff lying there. I did not take it out to see, but there was a great deal of silver plate there. He (Mr. Fleming) just opened the door and said, "They might have gotten away that if they had been wanting plunder." This was after he had told us that the spoons which were in use in the house had been taken away.'*

" 'Was there anything to account for a thief taking the spoons and leaving the other silver which you saw ?'

" 'That was the mystery that we could not see to the bottom of ; I have not seen to the bottom of it yet.'

" 'Was it the subject of conversation among you in the house that night ?'

" 'Yes.'

" 'Did you not tell about that other plate to the sheriff when you were precognosed by him ?'

" 'No. I never was asked. The fiscal was there himself, and the sheriff was there, and I suppose they saw it.'

" 'But the fact is you did not communicate it to the sheriff or the procurator-fiscal ?'

" 'No ; the superintendent of the criminal department was also there.' "†

Now it is not one of the objects of this paper to cast any imputation on any individual, and therefore we shall make no observation on the conduct of any of the parties to this transaction ; but we do venture to assert that a system, where the prosecutor, the sheriff, the procurator-fiscal, the superintendent of the criminal department, and a police officer are all aware of a most important piece of evidence in favour of a prisoner who is tried for murder, and yet that prisoner is tried,

* To the question put on the trial—"You found the silver and plated articles nearly all gone?" Mr. Fleming answered, "The articles that had been in daily use were nearly all away. All the silver and plated articles except the cruet-stand." Why did he not answer the question as put? It related plainly to all the plate in the house. See *Caledonian Mercury's* report of John Fleming's evidence.

† Report to the House of Commons, p. 98.

convicted, and sentenced to death, and not one syllable ever mentioned by any of them, till it is elicited by a subsequent inquiry, is one which ought at once to be altered. Sir Archibald Alison may well say "we have acquired our admirable system of prosecution, extending over the whole country, and practically found to be more beneficial than any other which the wit of man has ever devised for the suppression of crime."* But we must add that we desiderate a system which, whilst it so operates, does not imperil the innocent.

In any case the non-communication of the quantity of plate left would be most material on a charge of larceny; but there never was a case within our knowledge in which it was so material as in the one in question. The prisoner's statement was that she had received the plate from old Fleming to pawn, and this statement was given in evidence against her, and in considering the question whether she stole the plate or so received it, nothing could be more material to be known by the jury than the fact that much valuable plate was left in the place whence the other was taken; for that was inconsistent with the theory that the latter was stolen, whereas it was perfectly consistent with the statement that old Fleming had given it to her, especially considering his parsimonious habits, and might easily have solved the mystery that was too deep for the policeman. If the policeman had given the same evidence in court as he gave before Mr. Young, how different the case would have appeared to the jury!

We now turn to the actual commission of the murder. The case on the part of the Crown was that the prisoner committed the murder in the house, and the suggestion was that it was committed at four o'clock, A.M., and that old Fleming had nothing to do with it. Old Fleming stated that he first heard a loud squeal, which awakened him, and afterwards two others, not so loud, and that it was exactly four o'clock by his watch at the time.† Now the prisoner, in her statement

* 2 Alison, 87.

† Report, &c., p. 9.

after the verdict, alledged that she went to see the deceased, and found old Fleming in the kitchen, and that he sent her out of the house with a bottle to get some whisky; that she found the whisky shop shut up, it being after eleven o'clock, and on her return she passed Mrs. Walker and another woman, whom she did not know, talking to her, and went along the lane to the back of Fleming's house. That she found the kitchen door fast; and knocked and received no answer; then she went and looked in at the kitchen window, and saw no one. She then again rapped at the door; and after a little old Fleming opened the door, and let her in; * and she found that the deceased had been wounded across the forehead during her absence. Now, on Mr. Young's examination, R. Stewart proved that on the night in question he went to bed in the adjoining house at about eleven o'clock; and fell asleep immediately. He awoke in a fright; he felt sure it was a human voice which made the noise which woke him. The noise might have been not later than a quarter past eleven; it was not later than one; or there would have been some light, and there was none; it was as dark as when he went to bed. He heard no other noises afterwards. The sun rose at 3.41.†

Mary M'Intyre proved that she saw Mrs. Walker and Miss Dykes standing at the place described by the prisoner, after eleven, on the night in question, and saw a woman pass into the lane, and she herself passed Mrs. Walker and Miss Dykes, walking pretty quickly at the time, to the opening that leads to the front of Mr. Fleming's house. There were two or three ladies, and she thought a gentleman, standing there, and also two young gentlemen, not of the same party. She thought they were all talking of something that had attracted their attention. She heard one say "I heard—" (adding some words she did not hear) "I think it came from that house where the light is." The parties separated; she had only got just opposite the

* We have given this minute detail, because it was made before the prisoner knew that any persons had been standing in front of the house, and therefore this statement could not have been made with reference to them.

† Report, &c., p. 88.

house in question, when she heard a low, wailing noise, just like the moaning of some person in very great distress. She was sure it came from the house in question, and there was a light from one or two windows in the area.* Mrs. Walker proved that she stood with Miss Dykes at the place mentioned by the prisoner till a quarter past eleven. Two or three minutes before, a woman passed into the lane, she appeared to be carrying something in her right hand, and Mrs. Walker described her dress, but could not say whether it was the prisoner, as she did not see her face. A few minutes before eleven o'clock a woman had come out of the lane, but Mrs. Walker could not say whether it was the same woman, as she had not noticed her dress.† Miss Dykes believed the prisoner to be the woman,‡ and there could be no doubt about the fact, as it was in consequence of the prisoner's statement that she had seen Mrs. Walker, that she was brought forward at last. The persons seen by M'Intyre have never yet been discovered. Now it is quite clear that all these persons ought, and, if a public inquiry had been made at the time, probably would have been brought forward. The evidence of M'Intyre proved that violence was committed before and at the time she was in front of the house, and this evidence tended to fix the time of the cry Stewart spoke to, and there can be no reason to doubt that the ladies and gentlemen spoken of would have supported the evidence of M'Intyre. The distances from the place where Mrs. Walker stood to the front and back of the house in question are not stated, but it seems plain that they were short, and there could be little difference between them; and consequently the prisoner would get to the back, as near as may be at the same time as M'Intyre got to the front, of the house. And this renders it to the last degree improbable that she was in the house when the violence was committed; and it need hardly be added how extremely strongly it corroborates her statement. Stewart's evidence, too, goes to contradict old

* Report, &c., p. 88.

† *Ibid*, p. 90.‡ *Ibid*, p. 105.

Fleming's statement of the screams at four o'clock in the morning; and besides his evidence, three sisters proved before Mr. Young, that they passed in front of the house about four o'clock that morning, which was a beautiful morning, calm and still, and that they stood still to listen to the birds singing, and saw a light in the windows west of the door; but saw no one, and heard no noise.*

It is obvious how exceedingly material it was to the ends of justice that all these witnesses should have been examined on the trial. The question is not whether they would have actually proved the innocence of the prisoner, or the guilt of old Fleming; the question is whether their evidence was not most material for the consideration of the jury; for no trial can be considered to be satisfactory where material evidence that might be forthcoming is not produced.

There were also several other witnesses examined by Mr. Young who were not called at the trial, and whose evidence was very material; but we think enough, and more than enough has been adduced to prove that the Scotch system of private examination is decidedly erroneous.

The Lord Advocate, when examined before the committee on public prosecutors, said that the system—

“operates fully as much in the protection of innocent persons against unfounded accusations, as it does in the detection of crime; and, for my own part, I think that the want of publicity in the first examinations, if you have, as we have, a sufficient check in the superintendence such as I have described, tends very much indeed to the detection of the guilty.”†

Lord Brougham, on the other hand, being asked by the Lord Advocate—“what do you think would be the effect of public examination before magistrates and before coroner's inquests, as an initial proceeding with a view to a prosecution?” said—

“There is a great deal to be said on both sides, upon that as upon many other questions. There are great inconveniences, no doubt,

* Report, &c., 118, &c.

† Public Prosecutors, p. 18.

in the publicity of the examination; there is very great hardship to the party brought before the magistrate in its publicity; there is very great annoyance and trouble to the witnesses and to the prosecutor, who are brought before the magistrate, no doubt; but against all that, one cannot help setting the great advantage of the publicity of the proceeding, both preventing any malpractices, by placing the magistrate, who is then the court, in the eye of the public, and also by the great benefit which arises with a view to police, from its tendency to discover evidence, and to enable the parties prosecuting to be put upon the traces to find witnesses, so that, upon the whole, I have no doubt whatever that the benefits exceed the disadvantages of a public examination.*

Now it appears to us that there are two fallacies involved in the commendation of a private examination. Firstly, it is assumed that every witness who can give material testimony may be found, though the examination is private. Now nothing is more clear than that that is not the case. Instances are constantly occurring, where witnesses are brought forward by the publicity of the proceedings, who never would have been found otherwise. In Bartlett's case, tried at Gloucester many years ago, a most remarkable instance of the kind occurred. The murder was committed a few miles out of Bristol, and the time of it was fixed very accurately. The prisoner was seen going down the Arcade at Bristol by a witness, who fixed the time at half past three o'clock by the Arcade clock, at which he looked, and the great difficulty in the case was, how it was possible for him to have got from the place of the murder to the Arcade by that time, and his defence was chiefly rested upon this point. He was convicted, and then a watchmaker, having read the report of the trial, wrote a letter to Bolland B. to say that the works of the clock were in his shop, for the purpose of being cleaned, at the time of the murder, and consequently the hands were accidentally standing at half-past three o'clock. The point was one which very possibly escaped notice at the inquest, or, no doubt, the same

* Public Prosecutors, p. 10.

information would have been then forthcoming. In the midst of a great case at Gloucester, a man in London having read part of the trial, telegraphed to Sir F. Thesiger information which materially tended to break down the plaintiff's case. Cases may even occur where very important information may be given by a person who will not come forward as a witness. A maid-servant was once tried at Gloucester for stealing some of her master's property, which had been found in her box. Before the trial, her counsel received an anonymous letter through the post, in which it was stated that the master had taken out the bottom of the box, and replaced it before the property had been found in it. Nothing of the kind appeared in the depositions, or was stated by the master on the trial, until he was forced to admit it on cross-examination, nor did the prisoner know of it.

Secondly, the other fallacy is, the assumption that the whole of the preliminary examination must be private; this is obviously a mistake. A part of the investigation may well be conducted in private, and the rest in public.

In England, justices have always had authority to conduct the examination, either in public or private according to their discretion; and by the 11 and 12 Vict., c. 42. s 19, justices may, in their discretion, order all persons out of the room where the examination is going on, if it appear to them that "the ends of justice will be best answered by so doing." In practice, this power works very satisfactorily. Generally, the examination takes place in public; but cases occur where in the early stages of an inquiry it may conduce to the ends of justice that the inquiry should be private. A crime may have been committed, and there may be no one in particular suspected, or if anyone be suspected, no one may venture to make a charge against him, and it may be very useful that the facts should be stated to a magistrate privately, and his advice taken upon them. So, in the course of the investigation, cases may occur where it may be well that it should be conducted privately: but no case which is sent to trial suggests itself, in which a

time must not come when publicity may be useful, and can hardly be injurious. The trial must be public ; and as soon as the examination has proceeded so far as to make it clear that the case will be sent for trial, there seems no reason why the examination should not be made public ; the reasons for privacy must then have ceased, and publicity may then prove beneficial.

In England, when an accused person is brought before a magistrate for examination, the witnesses must be examined upon oath and in his presence, and he is entitled to ask them any questions he likes, and their statements must be taken down in writing, and if the case is sent for trial the accused is entitled to copies of the depositions. This system practically works very well, and it appears to be strictly in accordance with justice. To send a man to trial upon any statement of any persons not upon oath seems to be very unjust. In England, and, we conceive, in Scotland also, there is no means by which any person can be punished criminally for making any false statement, unless it be on oath ; and it would be an answer to any civil proceeding that the statement was made in a judicial proceeding. In many cases no reliance can be placed upon the statements of persons not upon oath. How often do witnesses, whose statements have been taken down, even by very careful attorneys, utterly fail to prove upon oath in court what they had previously said ; and how very marked is the difference with witnesses whose depositions have been taken in criminal cases. Where a witness has been examined on oath, it has a very strong tendency to prevent him from varying his statement on the trial ; and this, no doubt, frequently prevents the tampering with witnesses from succeeding. It is but just that the accused should hear the witnesses make their statements. No written examination, however accurate, can ever convey the same amount of information as a statement that is actually heard. A witness also will often make a statement against a person in his absence, and when not upon oath, which he would

not venture to make in his presence and upon oath. Cross-examination is absolutely essential ; for it may, and often does, break down the case before the magistrates. Even a single question occasionally has this effect. The other day on a charge of an assault with intent to ravish, the question "did not the accused continue smoking all the time?" being answered in the affirmative, caused the charge to be dismissed. It frequently happens with us that, during the examination of a witness, the accused interposes a remark which helps the prosecution. Sometimes also the accused admits the correctness of a witness's evidence on being asked whether he will ask him any question. Lastly, the depositions, being taken with us in the manner pointed out, are admissible as evidence in case of the death of the witness, and in some other cases. In Scotland, of course, this very important evidence is wanting.

The power to examine the witnesses for the prosecution, which exists in Scotland, by no means makes up for the want of being present when they were examined, and the absence of the right to cross-examine them. As no copies of their statements are allowed, the prisoner or his attorney is in the dark as to what they have said, and it must in every case be mere matter of accident whether the witnesses tell him the same story as they told to the sheriff; and where the witness is adverse, he cannot be expected to tell more than he is obliged, and is much more likely to say what is calculated to mislead than what may benefit the accused.

In England, under the 7 Geo., IV., c. 64, it was sufficient to put as much of the examination of a witness into writing as was material; but as soon as the Prisoners' Counsel Act, 6 & 7 Will. IV., c. 116, passed, which give prisoners a right to copies of the depositions, several of the judges intimated that the whole evidence of the witnesses should be taken down; and the 11 & 12 Vict., c. 42, s. 17, requires magistrates to take "the statement" (*i.e.*, the whole statement), of the witnesses, and to "put the same into writing." A doubt has occurred

whether this has not been going a step too far. That a prisoner should know the substance of the evidence to be adduced against him is perfectly reasonable; but the doubt is whether by taking down all a witness says, and giving the prisoner the power to cross-examine him on every statement in the examination, and to contradict him by his examination if he varies from it, honest witnesses may not occasionally be subjected to imputations on their credibility, to which they are not justly liable. It is very difficult to take down the very words of witnesses, and all persons are not capable of doing it equally well, and cases have occurred where the credit of a witness has been assailed in consequence of the inaccurate manner in which an examination has been taken in writing.* On the other hand, as examinations are admissible against a prisoner in the cases to which we have alluded, it is very important that they should be as full and accurate as possible. On a full consideration of both sides of the question, probably the reasons may preponderate in favour of the present system, and it is certainly that which is most favourable to the accused; and the court can, in general, prevent any unfair prejudice to a witness by pointing out whether the variances in his testimony be on material or immaterial points.

No reasonable doubt can be entertained that taking down the statements of the witnesses and furnishing the accused with copies of them, often tends to the discovery of the falsehood or inaccuracy of the statements made on the trial. In fact, it affords an excellent means of testing the truthfulness of a story, and the trustworthiness of the memory; and many an unfounded charge has been defeated with us by this means. If we mistake not, there is no power for the prisoner in Scotland to test the witnesses in any such way; and it is a power which certainly ought to be given in that country.

* We have a vivid recollection of some cases where examinations of the same witnesses had been taken both by coroners and magistrates, and in which, although the statements agreed in substance, they varied considerably in particulars.

On the whole, it seems to be advisable that the examination of the witnesses, and the taking of their depositions, should be placed on the same footing in Scotland as at present prevails in England.

We now turn to a point, on which both systems admit of very easy and useful amendments. In England, the prisoner, being present at the examination of the witnesses, and being entitled to copies of their depositions, knows the names of all that have been examined; but he is not entitled to the names or statements of any other persons who have not been so examined, and the Crown has the right to call any additional witnesses in every case, down to the close of the case for the prosecution, and where the prisoner calls witnesses, after those witnesses have been examined. On the other hand, the prisoner is not bound to give the Crown notice of any witness he intends to call, and may call any witness he pleases down to the last moment. In Scotland the prisoner is entitled to a list of the witnesses to be called against him fifteen days before the trial,* and if a new witness be discovered, the only means of obtaining his evidence is to serve a new indictment on the prisoner, and abandon the first. The prisoner also is bound in Scotland to furnish the Crown with a list of his witnesses two days before the trial. †

Now cases do occur, in which evidence is discovered even as late as whilst the trial is going on, or the course of the trial renders evidence necessary that was never thought of before. In Courvoisier's case, part of the stolen property was discovered after the trial began, and the evidence as to it was given against the prisoner. In Madeline Smith's case, if we err not, a witness for the prosecution was found during the trial, but could not be called under the Scotch rule. No one, we think, will doubt that all the evidence on both sides ought to be admissible upon the trial, wholly irrespective of the time when it was discovered, provided no prejudice be done

* Alison, p. 334.

† 31 *Law Mag.*, 268.

to the prisoner or to the Crown ; and as evidence may turn up at the last moment, any rule which requires the names of the witnesses to be delivered at any fixed period before the trial, must clearly be wrong. Where the prisoner has been present at the examination, there seems no reason why a list of the witnesses examined should be furnished to him ; but where he has not, or where other new witnesses are to be called, their names ought to be furnished to him as soon as reasonably may be ; it should, however, be allowable that any witness on either side who afterwards became necessary, might be called, as is now the case with us. In order, however, to prevent any undue prejudice either to the prisoner or to the Crown, the court should be empowered to adjourn the trial, and to discharge the jury, if necessary for that purpose, in the same manner as in case of an amendment under the 14 & 15 Viot., c. 100, s. 1. The Scotch system as to the prisoner giving a list of his witnesses, is clearly right, and ought to be extended to England. The present practice with us affords very unfair advantages to prisoners. They have all the benefit of knowing what the case against them is, and may set up any false defence, especially an alibi, at the last moment ; and the Crown may be perfectly ignorant of the witnesses intended to be called, and consequently quite unprepared either to rebut their evidence, or to test their credibility. The prisoner, therefore, in both countries, ought to be required to deliver a list of his witnesses in the same manner as the prosecutor, with the like power to call witnesses subsequently discovered or rendered necessary.

By the Scotch system the Crown must deliver a copy of the indictment at the same time as the list of witnesses is given. With us (except in cases of treason) this is not required, and, as a general rule, it seems to be quite unnecessary. The prisoner learns the charge against him much more intelligibly to himself by hearing the witnesses examined before the magistrates ; and it would be quite sufficient to make the

prisoner entitled to a copy of the indictment whenever he thought fit to require one.

In Scotland the prisoner must cause any special defence, such as an alibi, to be lodged with the clerk of the court at least the day before the trial.* This appears to be a very proper provision; but the time for lodging the defence appears to be too short. An alibi has been set up at a trial in Gloucester, where the prisoner was sworn to have been in London when the offence was committed. A day in such cases is too short a time to make proper inquiries. The time should be not less than a week, where there is a fair opportunity of giving so long a notice; and in other cases the only rule must be that the notice should be given at a reasonable time before the trial; and the same rule might well apply to both kingdoms.

There is a class of cases which, if we mistake not, are wholly unprovided for. These are offences begun in England and completed in Scotland, or *vice versâ*, and offences committed during a journey in railway and other carriages which cross the borders. Sir A. Alison seems to include in the former class cases which do not appear properly to fall within it. Thus, he puts the case of a forgery out of Scotland, and an uttering in Scotland. Here there is no continuance. The forgery is complete where the act is done, and the uttering is complete where it takes place: and each offence is triable in the place where it is committed. It is exactly the same as a forgery in one county in England, and an uttering in another; for at common law every county was as distinct from every other county, as one kingdom from another.† So Sir A. Alison puts the case of an abduction in England continued into Scotland, and says that the offender may be tried in Scotland; and possibly that may be so, on the same ground that a person who is guilty of an abduction in one county in England, and takes the woman

* Alison, p. 369.

† *Rex v. Weston*, 4 Burr., 2507.

into another county, may be tried in the latter.* But the point is very doubtful; for it has been held that if a man steal goods in Scotland and take them into England, he cannot at common law be tried in England,† and this is a stronger case; for larceny is a common law offence, and an offence against the law of all civilised nations; whereas abduction is a statutory offence, and created in England and Scotland by different statutes, and consequently it is difficult to see how an abduction commenced in England and continued in Scotland can be tried in the latter, if a larceny under the like circumstances could not.‡

But Sir A. Alison admits that if a man were mortally wounded in England, and died of his wounds in Scotland, he could not be tried in Scotland, nor could he in England, and it is for such cases that a proper provision is required. So where offences are committed during a journey by railway or other carriage, it may be impossible to prove in what part of the journey they were committed, and therefore they ought to be provided for in the same manner as such offences are by the 7 Geo. IV. c. 64, s. 13.

It has long been very clear to us that there ought to be a general provision by which any person should be made triable in any county or place where he was apprehended or in custody, unless before the trial began he satisfied the court that he might be prejudiced by his trial taking place before it, and in that case the court should have authority to order him to be removed to the proper place for trial. The necessity of trying a prisoner in the county or place where the offence was committed only affords a loophole in some cases for the prisoner's escape. The locality has nothing to do with the criminality, and after the number of years, during which all

* *Rex v. Gordon*, 1 Russ. C. & M., 947, where the abduction began in London and was continued into Oxfordshire.

† *Rex v. Anderson*, 2 East, P. C., c. 16, s. 156, p. 772.

‡ The 24 & 25 Vict., c. 96, s. 114, provides that 'any person stealing property in one part of the United Kingdom, may be tried in any other part where he may be in possession of the stolen property.'

cases of bigamy, forgery, and uttering forged documents have been triable in any county or place where the offender was apprehended or in custody, and have been so tried without a single complaint, it is clear the same rule might very advantageously be extended to all cases in the manner suggested, and that, too, both in England and Scotland.

In the recent consolidation Acts provision has been made that in England and Ireland, where a previous conviction is alleged against a prisoner, he shall not be called upon to say whether he has been previously convicted until he shall have been found guilty of the subsequent offence, and if he deny that he has been so convicted, then the jury are to be charged to try the question; and in the Coin Act a similar provision is contained, which extends to Scotland as well as to England and Ireland. There are, however, other cases in Scotland, where the previous conviction is proved as well as the subsequent offence, before the case goes to the jury; and it is clearly proper that a provision should be made that no previous conviction should be brought before the jury, even by pleading to it, until the subsequent offence has been tried, unless indeed the prisoner gives evidence of his good character.

Doubtless there are sundry other points upon which the English and Scotch systems differ, but we have said enough to show, that, if both were fairly and candidly considered, each might be much improved by adopting the useful parts of the other, and rejecting the imperfections of its own; and we cannot help thinking that such a consideration is expedient, and would, in all probability, lead to a great improvement in the criminal procedure of both countries.

ART. II.—THE LAW OF SLANDER; ITS PRESENT STATE, AND POSSIBLE IMPROVEMENT.

THERE are few branches of law on which a lawyer is more required to be well-informed, than that relating to slander and defamatory words.

Duelling having been discontinued, like the use of its own hair triggers, it follows that redress for insult, injury, or mischief-making arising from the venomous tongue must be sought in most cases before a judicial tribunal. Calumny spares nothing; and slander rather prefers victims "chaste as ice, pure as snow." The injury they may cause, the errors into which they may fall, the bitter wrath they may kindle, the torture they may inflict on sensitive pride and self-respect, are as nothing to the persistent retailers of falsehood or the callous maligners of reputation. And whether the wrong done spring from malicious spite or idle repetition of gossip, we see no reason for drawing a distinction between the direct or indirect purveyors of a malicious lie. There are some verses in an old number of the *Household Words*, which, after a wild legend of fiends, pronounce the "Calumny devil the worst of all." More truth lies herein than is commonly supposed.

The present state of the law as regards defamatory words, is anomalous. Satisfactory up to a certain point, it then lapses into a state termed by a great Ex-Chancellor "barbarous." It is to be hoped that amid the many promises of reform of which we hear, there will be one concerning this matter. A short Bill might well be introduced by a legal member of the House which should remove the stigma under which the present law lies.

Let us briefly summarise the law as it at present stands. Oral slander differs from written slander in a very important particular. The former is only actionable when taking the

form of words imputing a punishable offence, or words not imputing such offence, but producing special damage or injury. Thus, words of the coarsest and most offensive type, so long as they impute no felony or misdemeanour, are only actionable if some immediate injury follows on their use. All written statements or expressions, if defamatory, will support an action, but the right of punishing spoken words is far more limited. All writers agree in dividing actionable words into four classes: 1st. Those which impute an indictable offence. 2nd. Those which impute the presence of a contagious disease. 3rd. Those which injure professional or official character. 4th. Those which throw doubt on a title to land.

As regards the first class it follows that terming a man murderer, robber, or the like is actionable. Of course the mere right of action is not very valuable, as the facts of the case will influence the jury. In these words, imputing indictable offences, there is one exception. Many cases have decided that to term a man a thief, is not actionable unless the context imputes the commission of a felony.*

As regards the second class, it is well settled that to charge a man with having a contagious disease which will make his fellows shun him, is actionable. But the rule only extends to accusations of having, not of having had, the complaint in question.

As regards the third class, the right of action extends against any person uttering what will injure a man's official, professional, or business character. But the rule extends only to words spoken of this special character, not of private character. It is necessary, too, that the words spoken should apply by an immediate process to the office or profession held by the person of whom they are spoken. That is to say, they must be likely to produce a bad effect in reference to the person's fitness for such office or profession.

As regards the fourth class, words which defame a title to

* *Penfold v. Westcote*, 2 N. R., 335 *et alia*. See p. 6, Parry's "Introduction to Libel Act."

land, are, it has been said, actionable, whether special damage be alleged or not. It is, however, a necessary ingredient in the right of action that the slanderer should have had malice towards the person whose title he has impugned. And the case of *Malachy v. Soper* (referred to in Smith's L. C., Vol. II., p. 67) decided apparently that actual damage must be proved to support the action.

To some, it may seem that the list above given comprehends all species of defamatory speeches, and that by an ingenious stretch of meaning a remedy could be found for every verbal injury done to the innocent. A very little consideration will show that words which may inflict the keenest pain and wreak the most deadly revenge, may at present, as far as legal consequences go, be safely uttered. It is a fact, that in this nineteenth century, the most gross and coarse imputations, in the foulest language, upon a woman's chastity, are unpunishable at law. So it is with respect to expressions which sully a man's honour. To impute adultery or impurity to a woman—and to impute it in the plainest English, and with the vilest terseness—is an irremediable injury. Irremediable, indeed, not only socially but legally. Provided no damage is caused, and the epithet is not used in London or Southwark, the calling a woman by any of the *sobriquets* which denominate the most abandoned of her sex, entails no fear of an action on the offender.

So with respect to imputations on a man's honour. To call a man before a thousand people rogue, liar, or villain, is permissible. On this state of the law, the words of the late Lord Campbell are very precise:—

“I think that it is absurd that a woman of rank and character may not maintain an action for words imputing to her want of chastity, spoken in the most public and offensive manner, and that a man cannot maintain an action for words at a county meeting denouncing him as a liar, a coward, and a scoundrel.” *

* Speech before Committee, May 3, 1843, *vide* Parry's Libel Act.

Indeed the absence of such right of action seems one of those barbarous anomalies that crop up in our English law, akin to the clumsy expedient in actions of seduction, of making the parent declare for "loss of services." The commercial spirit is odorous in these anomalies; and the inability to understand any but pecuniary losses or social-commercial injury. The infliction of moral suffering which does not expose the sufferer to legal dangers the English law seems unable to understand. In the case of libel it does, because *literæ scriptæ manent*, but few people who know anything of the world will suppose that a written lie lives more tenaciously than one spoken by professed scandal-makers. It is a distinction without a difference, and very unfitted for existence in the nineteenth century.

"By the law of Scotland, redress is given," said the Lord Advocate before the Libel Committee, in 1843, "civilly, for words either written or spoken, if they contain injurious reflections upon individuals;" and he added, that civil actions for libel were not at all uncommon in Scotland. Herein, the law beyond the Tweed, as in its bankruptcy and its public prosecutorships, is much in advance of our own. The Lord Advocate specifically said that if there were an imputation made on the chastity of a modest woman, she had redress by civil action, by the law of Scotland, without proving that she had sustained any special damage. And he added that such right of action lay in the case of a man who is called a liar. "I cannot say that much inconvenience has arisen," was the answer of the witness to an inquiry whether inconvenience arose from actions brought for words of heat, spoken between low-bred people.

Despite this opinion, no alteration has as yet been made in the law of slander, and the sole and whole defence of the present anomalous state of things which those who fear its amelioration make, is the liability to cause frivolous actions, and to multiply litigation, which an alteration of the law might cause.

It is strange that no attention has been directed to the evil which this paper points out. That the law of slander is an inefficient law no one can deny. What substantial distinction, as regards right of action, can be drawn between written and spoken defamation? The Scotch law and the French law recognise no such difference. Words are weapons nowadays, as deadly in some instances as swords. Let any man dispassionately consider the suffering that can be caused, and the misery wrought by accusations or implications which at present do not fall within the category of actionable words, and he will assuredly see the necessity of protecting the innocent from the malice of a villain or the chattering of a fool.

Let all wilful speeches which are injurious to reputation, be punishable by an action on the case. To plead that this would open the door to trivial and vicious litigation, is to evince an extraordinary ignorance of preventive power and a gross distrust of the great body of attorneys. By means of a brief Bill the punishment of wilful slanderers, the amercement of harpy-plaintiffs, and the limitation of actions to sound causes, could be easily ensured. Such a Bill might be as follows in its chief provisions:—

1. That from and after the passing of the Act, an action of trespass on the case should be maintainable for any words wilfully and maliciously spoken which tend to degrade, defame, and vilify in public estimation, by imputing moral delinquency.

2. That no plaintiff recovering less than £5 damages in such action, should recover costs against the defendant without the certificate of the judge.

3. That the defendant should be at liberty to plead, as in actions for libel, the truth of such defamatory words, and the public benefit of so speaking such defamatory words, and that the whole of such plea must be proved to support a verdict for defendant; the truth of both allegations to be for the jury to decide.

This last provision would effectually check an existing evil,

the power of pleading the truth of a charge, raked up perhaps in after years for mere private spite, and with no earthly possibility of its publicity being a public benefit. Such disclosures, for the sake of malice, or from officious meddling, are as bad as deliberate defamation. The existing proviso of the law of libel making it necessary when pleading truth as justification to plead also the public benefit of disclosure, is a most salutary provision, and would act equally well in such a measure as I have sketched.

The exclusion of actions of slander from the county courts, and the forfeiture of costs, under a certain recovered amount, would effectually prevent all trivial actions from being brought. But it certainly appears to us that the right of action for all words tending to defame or degrade, with or without special damage, should be given. When it is considered how the honour of an innocent woman can be clouded, or the character of an upright man can be stained by the malice of a slanderer, it is assuredly just that the law should give the injured a remedy, and though money be no *solatium* for wounded feelings, it at all events punishes the slanderer.

W. READE, Junr.

ART. III.—C. J. HARGREAVE—JUDGE AND MATHEMATICIAN.

“**I** HAVE an immense respect for a man of talents *plus* the mathematics.” So declares Oliver Wendell Holmes, in one of his brilliant monologues, after drawing a comparison between the calculating machine invented by Mr. Babbage, and a “mere mathematician.” The subject of this memoir was a man of remarkable talents and rare general attainments, and not a “mere mathematician,” although it is probable that his

mathematical fame alone would save his name from oblivion ; and it is possible that his name may be better known to the scientific men of some future generation, than to those of our own time. Such was his own expectation (expressed to the writer of this memoir) when completing his "Essay on the Solution of Algebraic Equations," a work only effected by a sacrifice of rest and an expenditure of brain-power which brought on the illness of which he died in the month of April last.

The aspect of the late Judge Hargreave's life, however, which will possess most interest for our readers, will be that suggested by the part he took in working out the great and successful legal experiment known as the Irish Incumbered Estates Court.

Charles James Hargreave was born in 1820, at Wortley, near Leeds, and received his early education at a school at Bramham, some miles from Leeds. That school still flourishes under the care of the same head-master. In due time Hargreave went up to London and became a student of University College, Gower Street, where he passed through the full course of study, taking honours both in classics and mathematics, and graduating LL.B. On commencing the study of the law, he passed some months in the office of a solicitor, and afterwards was the pupil of Mr. Greening, and also of the famous Duval, at that time at the head of the conveyancing branch of the profession. The maxims of Mr. Duval, and the traditions of his well-thronged chambers, made a deep impression on the mind of his pupil, who had a remarkable power of retaining any saying or circumstance in his memory. There was hardly a point in conveyancing practice which he could not, in after life, illustrate by some singular example which had occurred in Duval's great practice, or as to which he could not quote Duval's opinion. Although never the pupil of Mr. J. H. Christie, he was so deeply versed in real property law, and had acquired such singular precision as a draftsman, that a considerable share of the papers passing

through Mr. Christie's chambers were for some years confided to him ; and thus, soon after his call to the bar, in 1844, he found himself in rapidly-increasing practice. About the same time he was elected professor of jurisprudence in University College, and he retained that position until his removal from London, in the year 1849.

Hargreave's name, although familiar to mathematicians, is chiefly known to the public in connection with the Irish Incumbered Estates Court. In the year 1848 the position of Ireland was peculiarly full of disaster. A famine had occurred in the previous year so wide-spread in its operation, and so intense, that every part of the island had suffered deeply, while some counties were reduced to actual misery. A famine or a plague may ravage a thriving district for a time, but may pass away, as the cattle plague is passing away, without leaving permanent traces behind it. The rich level grounds of England soon recover from an infliction which would reduce to destitution a less prosperous country. Ireland, in 1848, contained a large population, mostly of the small tenant class, which had suffered most severely through the famine, and could not recover its position, or discharge its vast debt to the the owners of the soil. The proprietors, as a class, had, for a length of time, received no rents. Those of them who were free from incumbrance, or nearly so, by strict economy managed to tide over the fatal period of famine ; and many an instance could be found of proprietors who not only managed to carry on without receiving rents, but who contributed largely to the necessities of the starving tenantry around them. This trying crisis was, however, severely felt by all : and it proved ruinous to the numerous proprietors whose estates were burdened with mortgages and family charges. The payment of interest on the incumbrances became impossible, and the spectacle presented itself of mortgagees and claimants of all kinds, to the number of thousands, besieging the courts of justice, and making vain attempts, by stress of law and equity, to recover some part of what was due to them from

debtors who had, in consequence of the non-payment of rents, become insolvent. A legislative attempt was made, in 1848, to check this growing mischief, by enabling the masters in Chancery to sell the estates; but the cumbrous machinery of the Court of Chancery (then unreformed) was unequal to the occasion, and the act was a dead letter. In 1849 the famous Incumbered Estates Act was passed. It is believed to have been suggested by the late Sir Robert Peel; but the plan was moulded into shape under the direction of Lord Romilly (then one of the law officers), the draftsman employed being the late Mr. Coulson. This Act established for a term of years (afterwards extended), a court of three commissioners, who were to sit in Dublin, and to receive applications for the sale of the incumbered estates. They were empowered to investigate title, and to sell the lands at once, at the instance either of their owners or of persons holding the incumbrances, and the purchase-moneys were to be lodged to the credit of the commissioners.

The novelty of selling first, and of ascertaining the claims afterwards, was justified by the frightful condition of the country, which demanded an immediate transfer of estates into the hands of persons capable of fulfilling the duties, as well as of exercising the rights, of ownership. The sale to a purchaser, and the statutory conveyance to him, had the effect of for ever discharging the land from all claims, which were in effect transferred to the fund, and were afterwards ascertained by means of searches, advertisements, etc., and paid off in due course.

This court, in addition to all the ordinary powers of a court of equity, had such extensive (not to say arbitrary) powers confided to it, as would enable it to sell off family estates, whether in settlement or not, without staying to inquire minutely to whom the purchase-money belonged. It was evidently of the utmost consequence that these large powers should be very judiciously, as well as very firmly, exercised. Never was more care shown in the selection of fit persons to

perform special duties. In order that the Court might at once command the respect of the Bar and the public, a judge of the Exchequer (whose practice had formerly been in Courts of Equity) was placed at its head, on the understanding that he was to devote a portion of his time to the working of the new tribunal. The second commissioner was an experienced member of the Irish Bar, Q.C., and *Regius* Professor of Law in the University of Dublin.

It seems to have been from the first determined that an English conveyancer should be attached to the commission; probably because a large amount of English money belonging to the insurance companies was invested in these estates.

There was also an expectation that the estates would be largely purchased by English capitalists; and it has been supposed that a London conveyancer was selected with a view of encouraging this class of purchasers.* The private history of Mr. Hargreave's appointment to this prominent and very important office has, for the most part, already appeared in a Blue Book, and may therefore be here repeated. The Government asked Mr. Christie to recommend them a conveyancer; and he at once mentioned the name of Mr. Hargreave, whom he described as one of the "best lawyers and best mathematicians," of the day, and as peculiarly well-fitted for the duties of the new tribunal. A proposal was accordingly made to Mr. Hargreave that he should be appointed secretary to the commission, with a salary of £1,500. He deliberated for many days on this handsome offer, and finally sent a reply declining it, on the ground that the services expected of him could not be fitly rendered by a subordinate and removable officer. The wish to obtain his services was,

* *Dublin Statistical Society's Journal*, May 21, 1855. The result, however, proved that the large majority of the purchasers were Irishmen; and as large sums were released by the operations of the court, and required re-investment, capital was forthcoming in abundance for the purchase of the estates, although the prices given were not, during the first two or three years, such as to satisfy vendors.

however, such, that he was immediately appointed to the higher post of commissioner.

In this way he assumed, at the age of thirty, a judicial station in what was at that time the most important Irish court of justice, with a well-earned salary of £2,000 a year.

The first duty of Mr. Hargreave and his colleagues was the preparation, during the summer of 1849, of a code of rules. This was an anxious labour, the powers of the Court being of a wholly unprecedented kind; but it was admirably performed, and the rules worked well until the year 1858, when, as will hereafter be seen, the Court underwent an entire change.

In November, 1849, began that torrent of business, which, flowing steadily for some years, would have swamped the Court had it not been for the energy and vigour displayed by the commissioners. For some years Mr. Hargreave was incessantly occupied early and late with his official duties, which were such as to admit of no cessation or leisure, except during the necessary vacations. He resided at Salt Hill, a pleasant suburban spot on the margin of the Bay of Dublin, and on his return thither at six o'clock daily a bundle of papers usually accompanied him, filling up the hours to an extent which rendered a somewhat retired life a matter of necessity; and thus he was prevented for some years from bestowing his thoughts on the mathematical problems which appeared to constitute his chief diversion to the end of his life. In vacations a foreign tour was usually undertaken: and the interest of this was much enhanced by his facility of gaining an insight into the construction of other languages, and by his intense love of natural scenery, which compensated for the want of any special interest felt by him in the artistic treasures and architectural monuments of foreign countries. In 1851, the rank of Q.C. was conferred on him, and he became a Bencher of his Inn of Court.

The period 1849-1858 was that during which Mr. Hargreave's abilities were especially valuable, and his services in the highest degree important. The amount of hard work

accomplished by the Court during these years can hardly be estimated by practitioners accustomed to the deliberate proceedings of ordinary courts. Not the least important part of the labour was in private, such as the reading of titles, statements, petitions, and affidavits. Much of this business required the most anxious care, inasmuch as the applications being made *ex parte*, the rights of absent persons, infants, and others, had to be protected by the commissioners themselves. Figures in cases like this afford but a partial idea of the business transacted during these years by the commissioners aided by a very small administrative staff. The following statistics may, however, be suitably added. The number of petitions filed from October 1849, to August 31, 1857, was 4,413; of these 1,363 were filed by owners of the estates, and the remainder by incumbrancers. The lands sold on these petitions were conveyed to the purchasers by means of upwards of 8,000 deeds of conveyance. The gross amount produced by sales of estates was £25,190,839, and these funds were all distributed among the persons entitled, excepting a balance of £961,809, which remained in the hands of the commissioners at the end of the period, to satisfy unadjusted claims.

Hargreave was small in stature, but his well-formed forehead and intelligent eye at once attracted the attention of any person brought in contact with him; and there was a certain quiet dignity in his manner which compensated for the want of an imposing personal presence. He early secured, and to the end of his career maintained, the respect of the bar by his unvarying patience, and the calm and courteous attention which he bestowed on all that was addressed to him. He was perfectly free from the habits, met with in some other judicial personages of great mental acuteness, of interrupting by frequent questions, and of intimating a decided opinion during the progress of the argument. His character as a judge of his court has lately been sketched by the colleague who had, for sixteen years, ample, almost daily, opportunities of estimating his merits; and it will be far better to transcribe some portion

of it than to attempt another description. In reference to the organisation of the Incumbered Estates Court, in which he took so important a part, Judge Longfield writes :—

“It is to be borne in mind that Mr. Hargreave’s practice had been confined to the chambers of a conveyancer, and that he had no experience touching the rules and practice of Courts of Equity. Nevertheless, he showed the greatest readiness in comprehending the spirit and effect of every rule, and he exerted himself to ensure that no rule should be wanted that was necessary for the protection of the suitor or the public, but that no unnecessary rules should add delay and expense to the proceedings in the suit. His advice and opinion on every point relating to the practice of conveyance were always received with considerable deference.

“The proceedings of the court, after the rules were published, consisted of two different branches. There was the perusal of abstracts of title, the settlement of deeds, and determining their construction and the rights of the parties. This was the conveyancer’s proper department, and he executed it with great skill and industry. He was a neat and accurate draughtsman, and very felicitous in finding proper forms of expression. He omitted nothing, and repeated nothing. His forms were equally free from prolixity and ambiguity. The next great branch of business was the decision of causes after argument. Here he was without experience. It may be said that his first experience in a court of justice was to preside in it as judge. But no person could observe any deficiency. His patience, his learning, and his impartiality, quickly secured the respect and confidence of the practitioners in his court, and his unequalled sweetness of temper made him a general favourite. Although of a nervous and sensitive temperament, nothing seemed to irritate him. He acted on all occasions with great firmness, persisting in selling estates according to his own judgment, when he might have secured his own ease and safety and apparent popularity by refusing to sell at the only prices that could then be obtained. But he was most in his element when an unusual combination of circumstances and complicated deeds seemed to produce inextricable confusion. His habits of order and his fine mathematical mind at once arranged the rights of the parties with a certainty approaching mathematical

demonstration. He never seemed happier than when he was engaged in a subtle mathematical analysis, or in determining the rights arising from a deed when every event occurred except those contemplated by the conveyancer who drew the instrument. But he is no more. And of the good feeling and discernment of the Irish it must be said, that they loved and honoured him while he was living, and deeply lamented him when he was removed."

The history of the Incumbered Estates Commission, 1849-1858, has great significance both for the lawyer and for the politician. It was an experiment of vast importance in our jurisprudence. If a few errors had been made by the commissioners or by their subordinates, those errors would have called forth animadversion on the part of the numerous personages, in and out of Parliament, who regarded the court with disfavour. There would have followed hostile criticisms in abundance from the section of the press which looked askance on a measure, beyond doubt, one of the most progressive ever introduced by any government.

The Court had numerous enemies both in Parliament and at the bar; and it was especially unpopular with country gentlemen, most of whom were in fear lest something should occur to bring them within its grasp; and all of whom regarded the transfer of any old mansion and estate from the hands of its hereditary owners to those of strangers (unknown to Sir Bernard Burke) with some degree of horror. Moreover the Court had a short tenure, and was therefore "on its good behaviour," and its further existence was contingent on the accurate discharge of all the duties committed to it.

Mr. Hargreave had occasion, once in reply to questions put by a Parliamentary Committee, but many times more privately, to state (and every statement made by him might be implicitly received) that, "No mistake of importance was ever made by the Court."

There had been, it is true, instances of errors made in selling estates the boundaries of which had not been marked

with perfect correctness; but in these instances, and they were very few, the amount of error was represented in each case by a plot of mountainous or boggy land, the value of which was so small as hardly to justify the expense of an application to correct the error. It is right to add that the proceedings of the commissioners were very much aided by the perfect series of ordnance survey maps which has for many years existed in Ireland.

The large amount of work thus transacted, and the public benefits which resulted from it; frequently attracted the attention of the legislature. It was felt by all statesmen, even so early as 1855 and 1856, that the public advantages derived from "Parliamentary Titles," could not be allowed to come to an end. The chief question, and one frequently debated in Parliament, was this—whether the Court, with all its powers, should be merged in the Court of Chancery, or whether it should be made permanent as an independent tribunal? Many plans were devised for carrying out one or other of these proposals, but they came to nothing, and the existence of the Court was in the meantime prolonged by means of temporary Acts of Parliament. In 1857, the senior commissioner, who was also a Common Law Judge, retired; and it was generally expected that the Court would in future have consisted of two instead of three judicial members. Mr. Hargreave, although he afterwards regretted the course taken by him at this juncture, at the time felt indisposed to have additional business thrown on him; and he sent to the government a representation to that effect; the result was that an eminent member of the Irish Bar (Mr. Martley, Q.C.) was placed over him as chief commissioner.* It was evident, from this appointment, that the permanence of the Court was resolved on; and very soon afterwards, when the Conservatives came into power, it was announced that the new Irish Attorney-General (Mr. Whiteside), had a Bill in preparation

* Mr. Martley died in 1859, and thenceforward the Judges of the Court were equal in rank and salary.

for establishing the Court in perpetuity, under the designation of "Landed Estates Court." This measure contemplated a Court of two judges, with ample powers for giving "judicial declarations" of title, and for selling unincumbered estates. This measure was favourably received, and the only objection to it was that, if it had passed in its original shape, Mr. Hargreave, being the junior of three, would not have become one of the two judges whom it was proposed to create. It might have been, on various accounts, more advantageous to him to have retired from the public service on the pension which would have been secured to him, but he was always rather disposed to let things take their course. And when many Members of Parliament strongly impressed on the government of the day that his merits ought to be acknowledged by making him one of the judges of the new Court, he acquiesced; and thus his destiny was fixed for the remaining years of his life. He had shortly before married, and had taken a house in Dublin. The first duty of the judges of the newly constituted Court was to frame rules and regulations; and unfortunately the old rules which had been so thoroughly tested, and had worked so well, were thrown aside, and a new code was drawn up of a very complicated character. For this the junior of the three judges was scarcely responsible. The result undoubtedly was, that the business of the Court at once fell off, for solicitors would not advise their clients to place themselves under a cumbrous mode of procedure; and a deputation from the Incorporated Law Society soon afterwards waited on the judges to represent the inconveniences arising from the new code; and obtained a conditional promise that, after a short probationary interval, a more concise and intelligible body of rules should be promulgated. In July, 1859, a new procedure was instituted, based chiefly on that which had worked so well under the Incumbered Estates Acts. It was drawn up, at Hargreave's request, by the writer of this memoir, and it continues in force. The business of the Court soon again increased, but it has never reached, and is likely

never to reach, the amount transacted in the years prior to 1858 ; and the work has of late years been comparatively easy, although still heavier than that of the superior courts of Dublin.

The worst days of "incumbered estates" came to an end about the time when the Court was permanently established ; and in the new jurisdiction of making title to unincumbered properties, carrying out contracts for sale, and otherwise giving effect to amicable dispositions of property, the old character of the Court, as of a tribunal busied in enabling creditors to realise their demands, passed away. It was a great relief to Hargreave to be able to resume studies from which he had been for some years almost entirely debarred. He found it possible, moreover, during the last three or four years of his life, to spend a few days in almost every term in London, renewing his acquaintance with old friends, and appearing in hall among the benchers of the Inner Temple. Here he met with society of a very congenial kind, which he much enjoyed. In 1865 he was master of the library of his inn, and had he lived he would this year have succeeded to the office of treasurer.

Judge Hargreave, although not an ardent politician, took an interest in public affairs, and carefully studied the Parliamentary debates. He might be classed among the "constitutional Whigs," if classification were justifiable with regard to one who never interfered in political strife. He was well acquainted with international law, and had a considerable knowledge of political economy, and especially of the writings of Mr. J. S. Mill, from whose conclusions on many points he, however, dissented. He showed practically his approbation of those systems of entail and strict settlement of which Mr. Mill and some other philosophical minds disapprove, by the testamentary dispositions which he made of his own property. He took an interest in many of the proposals made from time to time for amending the law ; but his remarks on this subject usually had reference rather to the administration of the law, and to modes of procedure, than to any change in the doctrines

of law. He frequently expressed a decided opinion that all cases arising out of libel, slander, assault, &c., where substantial injury had not accrued, ought to be summarily disposed of, without the cumbrous and costly machinery of an action tried before a jury.

We have seen that the ability, energy, and vigilance, so signally displayed during the early years of the Incumbered Estates Court, when the pressure of business rendered the utmost dispatch a matter of necessity, led to the permanent establishment of the tribunal, to which was committed the power of issuing Parliamentary or indefeasible titles. That power having been safely and prudently, although rapidly, exercised under an extreme pressure of business, it was rightly concluded that it ought to be continued in easier times, when the diminution of applicants rendered a still more careful scrutiny possible. The history and success of the Incumbered Estates Court were very prominently brought forward in the speech of Sir H. Cairns, when, in 1859, he brought forward his plan for establishing in England a similar court, and also a registry of indefeasible title. Again, in 1862, Lord Chancellor Westbury, while introducing his Bill (afterwards passed into a law) for establishing the Land Registry Office, eulogised the conduct of the Irish court, and quoted its success as a justification for establishing in England a system which, however perfect in theory, could never have been introduced here unless strongly fortified by the favourable experience of many years in Ireland.

Some years previously, a commission had been organised for selling incumbered estates in the West Indies, the forms and procedure of which were modelled after those of the Irish court. The progress of indefeasible title in England has hitherto been slow; but a beginning has been made; and it is highly probable that, before many years have expired, it may be found necessary to establish a separate court in connection with the Land Registry Office, for it is not to be expected that the already inadequate judicial staff of the Court

of Chancery will be able to transact business of an unusual kind in addition to ordinary duties.

The subject of a registry of indefeasible title was always full of interest for Mr. Hargreave; and he perused with great attention the statements made by Mr. R. R. Torrens, lately Registrar-General of South Australia, to whom is due the credit of having been first actually to carry into effect a system of registry of title in the British dominions. When, in 1864, Mr. Torrens, aided by an influential committee, formed a plan for establishing a Registry of Irish Titles, supplementary to the Landed Estates Court, the subject of this memoir wrote a lengthened criticism of the scheme, in the form of a letter to Mr. H. D. Hutton, the honorary secretary of the committee. This document first suggested the formation of a new department of the Landed Estates Court, in which an indefeasible record of titles originally granted by the Court might be maintained, with the power of judicially amending the record, if necessary. The plan so sketched out came under the notice of the law officers of the Crown, who undertook to prepare a Government measure which should accomplish the objects in view. A Bill was accordingly drawn, at their request and under their direction, by the writer of this memoir. It was read a first time in July, 1864, but the close of the session prevented further progress. This Bill proposed to record the titles originated by the Landed Estates Court, not taking notice of trusts; but where trusts existed, recording the trustees as owners, with a system of caveats. In this respect it accorded with the plan of Sir H. Cairns; but other points were suggested by the experience of the English and Australian Acts, as to which careful inquiries had been made. In the recess the Bill was slightly altered, so as to admit of life estates and other limited interests, equitable as well as legal, being separately registered. This change was not approved of by Judge Hargreave; but in other respects the measure had his cordial approval; and, in fact, he had revised and amended the draft of the Bill, not in the character of Judge

of the Court, but as a friend of the draftsman and interested in the subject. During the progress of this measure, he visited more than once the Land Registry Office, in Lincoln's Inn Fields, and gained an insight into the actual working of Lord Westbury's Act. The result of his investigations was that he was convinced of the utility and public importance of a register or record of indefeasible titles. When asked by the Viceroy (the Earl of Kimberley) whether the new office for recording indefeasible titles in Ireland, was likely to prove successful, his reply (as repeated by himself, on the following day, to the writer of this memoir) was decidedly in the affirmative.

In the first week of April, 1866, the Record of Title being fairly established, Judge Hargreave arranged to take charge of any judicial business to arise out of the new jurisdiction; but his last illness at once occurred, to put an end to the hopes founded on his tried ability in working out legal improvements.

An eminent mathematician, writing of him, says:—

"It is to be feared that his premature death must be imputed to his having chosen as his principal recreation one which only substituted one form of mental labour for another, and which gave his brain scarcely any rest from continuous exertion."

He never published any legal treatise, but his mathematical essays are numerous. For one of the earliest of them, "On the Solution of Linear Differential Equations," the gold medal of the Royal Society was conferred on him, and he shortly afterwards became a Fellow of that distinguished body. Other papers, chiefly contributed to the "Philosophical Transactions," were "On General Methods in Analyses for Resolution of Linear Equations in Finite Differences, &c.," 1850; and "On the Problem of Three Bodies," 1858. He also contributed the following papers to the *London and Edinburgh Philosophical Magazine*: "Notes on the Solution of Differential Equations," 1847; "Analytical Researches concerning Numbers," 1849; "On the Valuation of Life Contingencies," 1853; "On the Application of the Calculus of Operations to Algebraical Ex-

pressions and Theorems ; ” “ On the Law of Prime Numbers,” 1854 ; “ On Differential Equations of the First Order,” 1864. The honorary degree of LL.D. was conferred on him by the University of Dublin in 1852.

In the summer of 1865, Judge Hargreave’s attention was again drawn to a new method of solving Algebraic Equations, and he commenced the essay on this abstruse question which may be regarded as the cause of his death. The essay is now printed, and it will have a singular interest for “ pure mathematicians.” For some time previously he had not enjoyed robust health, and his friends had, on this account, frequently endeavoured to withdraw him from the mathematical investigations which seemed to form his favourite occupation during the intervals of court business. Their efforts, however, were in vain. Constant thought and want of rest brought on exhaustion of the brain ; and although after some days he rallied, and hopes of his recovery were entertained, a relapse followed, and he died on the 23rd of April, 1866, at Bray, in the county of Wicklow.

ART. IV.—CLERICAL AND LEGAL VIEWS ON RITUALISM.

The Church and the World ; Essays on Questions of the Day.

By various Writers. Edited by the Rev. ORBY SHIPLEY,
M.A. London : Longman & Co., 1866.

THE above volume is, we presume, intended as a manifesto from the party in the Church of England which calls itself Catholic. The essays relate to a great variety of subjects, but they have all more or less directly one tendency, and are all obviously meant to support one set of opinions. The subjects treated of are principally theological and ecclesiastical, and if not discussed in a strictly judicial manner, the views of the

writers different are at least set forth with sufficient clearness to enable persons of moderate acquirements in such learning to understand their scope and object.

We do not mean, indeed, to say that the ability or learning displayed is in any case overpowering, but many of the questions considered are not very familiar to ordinary individuals, and, we may add, are not likely to excite much interest amongst the generality of mankind. We do not, therefore, anticipate any very extensive circulation for this work, except amongst the party in the Church of England from which it proceeds, and amongst those whose anxiety for the welfare of the Church renders them careful to note the varying phases of opinion amongst the different sections of her members. The only chance for the work attaining anything like general fame would be, we must candidly say, a prosecution against some of the writers, and then the same result, to some extent, would doubtless take place as was exemplified in the case of the "Essays and Reviews." If we thought much good was likely to be done by the extensive circulation of the book, we should certainly counsel proceedings being taken, but as we have no very strong opinion on this point, we think it as well that this collection of essays should be left to its natural fate. Fortunately, the essay which contains doctrines likely to be most obnoxious to the great majority of members of the Church of England is by a lady, whose name of course is not given, and who can safely defy Convocation and the Privy Council. Speaking as special pleaders, we give our unqualified admiration to this stroke, as superior to any thing we have ever known done by the acutest practitioner of the law. We need hardly add that the several authors of the essays contained in the volume have followed the course of the Essayists and Reviewers in disclaiming all responsibility except for what is contained in their own contributions.

We have no hesitation in saying, that the essay to which we have just referred, is by far the most interesting paper in the volume. We do not of course mean to place the "Thirty

Years in the English Church" on a level with the "Confessions" of St. Augustine or of Rousseau, or with the "Apologia pro vitâ suâ" of Dr. Newman; but as a contribution to the study of the morbid anatomy of the female heart, we think it extremely valuable. A woman of a highly religious character, in whom the sensitive and imaginative parts of her nature over-balance an intellect by no means of an ordinary quality, is here revealed to us in all her weakness, and in all her wilfulness. Abject as she is towards that portion of the clergy to whom she has surrendered herself, the cardinal principle of her religious philosophy is obviously "I think so; therefore it is true." Mystical and sentimental as she is in her tone, and aspiring as she does after something for which this human life is not fitted, we fail to discover any real impression of moral duty. A long career of spiritual dissipation, indulged in without restraint, has reduced her to a condition which we cannot but think affords a warning to her sex of what they ought most sedulously to avoid.

Of course we speak of this lady only as a subject of psychological study, and pronounce no opinion on the theological views which she propounds. Lawyers are not in general addicted to heresy-hunting, and we have nothing to do, in a professional capacity, with religious doctrines, except when a question arises with respect to them in a court of justice. But waiving any discussion of this nature, we cannot but observe on the general tone of superiority to all other people which runs through these essays, and which in some cases is not a little offensive. The moderate High Church party, the Broad Church party, and the Evangelical party, are all condemned in the most unmitigated manner, and not only are they censured as theologically unsound, but all their efforts for the religious improvement of the community are held up as signal failures. The hope of the English Church is now in the Ritualist party. It is to absorb all other parties in the Church—it is to win over dissenters to the Church—it is to bring in the poor to the Church—it is to extend the Church through-

out heathen lands. Such are always the delusive expectations of new sects, religious or political.

We need scarcely inform our readers that ritualism does not simply mean the adoption of certain rites and ceremonies in religious worship, but implies certain doctrines without which those rites and ceremonies are entirely meaningless, but with which they have a deep and appropriate significance. We do not share the opinion of those who think that if the doctrines be true, the ritualism is unnecessary, or out of place. On the contrary, we hold that if the view taken of Christianity by this party be correct, they have in no instance exceeded the natural and suitable limits which the nature of the case marks out, but that they have rather fallen short in all the external means and appliances of reverence.

We are aware that they consider themselves as bound by the former practice of the Catholic Church ; but that practice was, no doubt, upon any showing, a thing of gradual formation ; and there seems to us no reason why improvements should not be made so as to bring up the system to all that in the present day can be conceived as most striking in external effect. We certainly should desire to have something higher in the way of music than the Gregorian Chant, something more stirring to the imagination than candles lighted on the altar ; and a more impressive mode of reading the service than the rapid and irreverent muttering which has been adopted by clergymen of the ritual school.

But the great question with which we have to deal is, how far this system of ritualism is sanctioned by the law of the Church. In a recent number of this journal* we expressed our general views on the subject, and to those views we still adhere. In one of the essays in the present publication, by the Rev. T. W. Perry, the case is stated very ably in favour of the extreme view, but his arguments have not induced us to alter our opinion. Mr. Perry is, we believe, a great

* February, 1866.

authority on the subject of ritualism amongst the party to which he belongs, and the question is discussed by him very fairly, and with a considerable amount of learning. Agreeing with us in our interpretation of the present rubric, he thinks that the rubrics of the first Prayer Book of Edward VI., to which it refers us, were not exclusive. It is clear to us, however, that these rubrics were exclusive as to the "ornaments of the minister," upon every sound principle of legal interpretation. When certain ornaments are prescribed—and minutely prescribed—we must come to the conclusion, that whatever is not mentioned must be considered as forbidden. The scarf, it is true, is not mentioned; but that, we take it, is an appendage of the surplice when worn by clergymen; and with respect to the black gown used in preaching, it is a matter on which the rubrics say nothing, and the customary dress worn by the clergy must therefore be considered as lawful, as, in our view, it is perfectly becoming.

Again, as respects the "ornaments of the church," every serious question relating to these has been settled by the judgment of the Judicial Committee in the Knightsbridge case, and Mr. Perry does not express any dissatisfaction with that judgment. He does not share the views of those unreasonable members of his own party who think that the present rubric does not refer to the first Prayer Book of Edward VI., as the judgment in the case referred to has determined on the most obvious principles of interpretation.

But Mr. Perry is of opinion that when it was said in that judgment, that "the same dresses and the same utensils, or articles, which were used under the first Prayer Book of Edward VI., may still be used," some very important questions are opened up, as to what ornaments were so used, and as to whether all the ornaments used under that Prayer Book may still be used. We must say, however, that this reverend and *learned* gentleman has disquieted himself in vain, and has entered into a long and elaborate argument on this subject, which, to our minds, is quite irrelevant. "Used under," has

exactly the same meaning to every lawyer, with reference to the matter to which it is here applied, as "prescribed by." Even if any things were used during the time the first Prayer Book was in force which it does not prescribe, the present rubric is clear in authorising only what that Prayer Book sanctioned, and any addition to this is therefore illegal. If the Knightsbridge case is to be followed in any other case that may arise no lawyer can entertain any doubt as to what the decision would be; and any court would be exceedingly bold which should attempt to overrule the judgment which was then given.

We can have no hesitation in saying that the present Prayer Book, with what the rubric, as interpreted by the Judicial Committee, refers us to, affords the standard of "Public Worship, and Administration of Sacraments and other Rites and Ceremonies of the Church of England" (13 & 14 C. 2, c. 4, s. 2). The law is as precise and as clear on this point as on any other matter connected with our ecclesiastical system; and no other idea has ever entered into the minds of any men who were guided by the sober principles of reason.

A writer in the present volume—not Mr. Perry—has ventured on the audacious assertion that "the Liturgy of 1549 is the standard of ritual of the modern English Church, so far as she has ever possessed an authorised standard," p. 504. This is, in fact, the thesis which is maintained by the editor in the concluding essay; and we can fully recommend it to our readers as one of the most amazing instances we have ever seen, even of clerical perverseness and presumptuousness. What these gentlemen avowedly aim at is to restore the Church of England to what it was in the first stage of the Reformation; and they are foolish enough to suppose that if they can succeed in doing so, they will thereby conciliate the Roman and Greek Churches. A notion more preposterous never entered into the minds of any rational beings; and we do most sincerely regret that so much zeal and so much labour should be wasted on an object so utterly foolish, and so entirely hopeless.

It is refreshing to turn from such speculative disquisitions as this volume contains on ritualism and liturgies, to the opinion given by those eminent lawyers who have recently been consulted on the matter, and who understand the real bearings of the case and the true *rationes decidendi*. We are not inclined to agree, in all respects, with the views of Sir R. Palmer, Sir H. Cairns, Mr. Mellish, and their able junior, Mr. Barrow ; but in turning to their opinion, we at once get rid of that awful ecclesiastical darkness which so prevails in the other quarter, and find ourselves at least in a region where the twilight has begun, and where signs of opening day appear.

The first question submitted to these gentlemen was as to the vestments prescribed by King Edward VI.'s first Prayer Book. In answer to this, counsel say—

“A careful consideration of the language of the Act of Uniformity, 1662, and the rubrics of the Prayer Book, and a comparison of that language with the previous rubrics and enactments applicable to the question, lead us to the conclusion that the intention of the legislature was not to revive or restore the use of ornaments which had become obsolete. The Statute of Elizabeth, as altered by the advertisements, had been recognised by the liturgy and canons of James, in 1604, and appears unquestionably to have been in force down to 1662 ; and since there is nothing in the statute of that year (except so far as it established the rubric) which touches the point, it is by the rubric alone that the practice, which had been established by the advertisements, can have been altered or repealed. We do not think that the rubric has, or was intended to have, this effect. On the contrary, it would seem to apply only to such ornaments of the minister as are common at all times of his ministration, and to point to a retention of such as were then in use, rather than to a revival of such as had been displaced by the advertisements. The interpretation is supported by the universal practice which prevailed from 1662 down to the present time, and which affords a ‘contemporaneous exposition’ of the rubric, to which very great weight would be attached in every court in England.”

Now this is a clear and intelligible opinion, but we must be permitted to question its soundness. It is obvious that it is on the interpretation of the present rubric that the whole question turns, and for the convenience of our readers we set it out at length.

“And here it is to be noted that such ornaments of the church and of the ministers thereof, at all times of their ministration, shall be retained and be in use as were in this Church of England by the authority of Parliament, in the second year of the reign of King Edward VI.”

The rubric, it is obvious, leaps over the canons and the advertisements, and takes us back to the first Prayer Book of Edward VI. pure and simple. There is nothing in it of a qualifying nature, and the only possible doubt can arise from the words “at all times of their ministration.” But even if these words should seem to imply only one kind of vestment, which we are far from admitting, the moment we look at the provisions of the Prayer Book referred to, a sort of latent ambiguity arises, as we find there two kinds of vestments mentioned, one applicable to the ordinary service, the other to the communion; and the only correct interpretation, therefore, as it appears to us, is, *reddendo singula singulis*, to apply one set of vestments to the ministration to which it is appropriated, and the other to the ministration to which it is appropriated by the first Prayer Book of Edward VI. The intention of the legislature must be inferred from the language employed; and we submit that our interpretation gives a much more natural meaning to the words here used, than that which is proposed in the above opinion. For the latter can be supported only in one of two ways, both of which are, we humbly think, unwarrantable. It may be supported by interpolating after “and be in use,” the following words, “as are now in use and—” or by interpolating after, “as were in this Church of England,” words limiting the ornaments to those prescribed for the morning and evening services.

To either of these courses great objections lie, whereas our interpretation takes the words as they stand, and construes them simply with reference to the subject-matter of which they treat. We cannot but think, also, that if it was intended that only the surplice and hood were to be used, there was no necessity for going back to the first Prayer Book of Edward VI. It would have been more natural to refer, with some slight addition, to the second Prayer Book of that sovereign, or to the advertisements of Queen Elizabeth, or to the Canons of 1604, or to some unequivocal standard, which the smallest exercise of ingenuity, clerical or legal, might have pointed out explicitly.

We need scarcely observe that there were no "ornaments of the minister common at all times of his ministration," under the first Prayer Book of Edward VI., and therefore any suggestion of this nature is entirely out of the question—while, as regards the word "retained," we think it quite impossible to deduce anything from its use, as the same word is employed in the 1 Eliz., c. 2, s. 25, with reference to the same matter, and the present rubric, by adopting the language of that statute, is obviously intended to be taken in the same meaning. The statute, it is to be observed, says nothing about "times of ministration," but simply enacts "that such ornaments of the church, and of the ministers thereof, shall be retained and be in use as was in the Church of England by authority of Parliament in the second year of King Edward VI." But we must profess ourselves quite unable to see that the additional words used in the present rubric qualify its meaning, or suggest anything more than is implied in the statute.

With respect to the doctrine of "contemporaneous exposition," it is certainly subject to many important qualifications, and is not, we think, at all applicable to the present case. All that can be said here is, that there has been a non-user, which, in a strictly legal view, cannot be considered of much avail. We have only to add that our view of the interpretation of the rubric is fully confirmed by the language of the

judgment in the Knightsbridge case, where, after giving the rubrics to the different Prayer Books, it is said, without qualification, that "they all obviously mean the same thing. that the same dresses, and the same utensils or articles, which were used under the first Prayer Book of King Edward VI. may still be used." It is true that the question as to the "ornaments of the minister" was not then before the court, but it is obviously in *pari materiâ* with that respecting the "ornaments of the church," and is entirely bound up with it; and this language, therefore, with respect to the former, cannot be considered as a mere *obiter dictum*.

The second question put to counsel related to the use of lights on the communion table during the communion service, not burnt for the sake of giving light, but as an ingredient in the service itself; the use of incense burnt in thuribles or censers for censuring persons or things; the ceremonial mixing of water with the sacramental wine; the use of wafers instead of bread; and the use of hymns before or after the prayer of consecration, &c. In answer to this counsel say:—

"We think that the use of lights in the manner indicated in the question is illegal. The point is, in fact, *res judicata*, having been settled by Dr. Lushington's judgment, to which we have been referred. We think the use of incense in the way suggested, clearly unauthorised and illegal. The ceremonial mixing of water with the wine as a significant act in the course of the service, appears to us to be illegal. We think that wafers would not be considered to be bread within the meaning of the rubrics referred to. The introduction of hymns, either immediately before or after the prayer of consecration, or during the administration of the elements, appears to us to be unauthorised and illegal, since it would tend to interfere with the unbroken continuity of the service."

In all these views we entirely concur, upon the obvious principle that none of the practices mentioned are authorised by the present Prayer Book. The Book of Common Prayer, from the time it had been first drawn up, had been several

times altered and revised before it received its final revision, in 1662. Various ceremonial observances had been minutely prescribed—the object had all along been to secure uniformity—and it is utterly inconceivable, therefore, that other observances relating to the same matters as those which were so carefully regulated, and many of them of the most striking significance, should have been left altogether to custom, or tradition, or mere caprice. But the last Act of Uniformity, which establishes the present Prayer Book, is as explicit on this point as human language can well be. It says (13 & 14 Car. II., c. 4, s. 2)—

“Now in regard that nothing conduceth more to the settling of the peace of this nation (which is desired of all good men) nor to the honour of our religion, and the propagation thereof, than an universal agreement in the public worship of Almighty God ; and to the intent that every person within this realm may certainly know the Rule to which he is to conform in public Worship and Administration of Sacraments and other Rites and Ceremonies of the Church of England, and the manner how and by whom Bishops, Priests, and Deacons are and ought to be made, ordained, and consecrated ; Be it enacted, &c., That all and singular ministers in any Cathedral, Collegiate or Parish Church or Chapel, or other place of public worship within this realm of England, &c., shall be bound to say and use the Morning Prayer, Evening Prayer, Celebration and Administration of both the Sacraments, and all other the public and Common Prayer, in such order and form as is mentioned in the said Book annexed and joined to this present Act and intituled, The Book of Common Prayer, &c.”

It is ridiculous to suppose that this Act was only intended to enforce the *minimum* of Uniformity, and that there was an *esoteric* practice which the Book of Common Prayer was not designed to disclose. The Act of Uniformity may have been an unwise and impolitic measure—its effects on the Church of England may have been baneful in the extreme, but no one can doubt that it was seriously drawn up, and meant what it said. Its

framers might be harsh and inconsiderate in their policy, but they were not Jesuits. Such as it is, it is the legal sanction on which the authority of the Prayer Book rests—and we are entirely convinced that it renders illegal any practices which are not contained in that book, and which relate to matters with respect to which that book has prescribed what is to be done. To hold otherwise would be opposed not only to all sound legal principle, but to all the dictates of common sense.

Of course we fully agree with the view laid down by the Judicial Committee in the Knightsbridge case, when they say that “they are not prepared to hold that the use of all articles not expressly mentioned in the rubrics, although quite consistent with, and even subsidiary to, the service, is forbidden;” but the articles mentioned by them—organs, pews, cushions, pulpit-cloths, hassocks, and seats by the Communion table—show clearly to what class of things this principle can apply. It is impossible to stretch it so as to cover the use of what would constitute an important part of the service, and which, when introduced, has the effect of changing materially the form of public worship and administration of sacraments as prescribed by the Book of Common Prayer. Some difficulty, we admit, might arise in the application of this principle in certain cases, but we really see no difficulty whatever with respect to all those matters to which the answer of counsel to the second question relates. So far as these are concerned it is entirely to be put on one side.

Upon the grounds now stated, we think it is a vain and needless matter to inquire as to whether lighted candles on the altar, or the burning of incense in censers, or any of the other practices to which the attention of counsel was called, may have been used in certain places whilst the first Prayer Book of Edward VI. was in force, or even after the passing of the Act of Uniformity of the 1 Eliz., c. 2. It is clear that any such use as has been proved was of an exceptional character, and, in any case, was far from coming up to the practices now in question. Nothing, we admit, is more likely than that, after

the restoration of Protestantism under Queen Elizabeth, some of the old practices, in a modified form, may have lingered in many places, although not sanctioned by the law. The state of matters at this time, as described by Lord Macaulay in his article on "Burleigh and his Times," is, no doubt, historically accurate. "The religion of the English," he says, speaking of the period to which we now refer, "was a mixed religion, like that of the Samaritan settlers, described in the second Book of Kings, who 'feared the Lord and served their graven images;' like that of the Judaising Christians, who blended the ceremonies and doctrines of the synagogue with those of the church; like that of the Mexican Indians, who, during many generations after the subjugation of their race, continued to unite with the rites learned from their conquerors, the worship of the grotesque idols which had been adored by Montezuma and Guatemozin." It is quite probable, therefore, that, despite Acts of Parliament, Advertisements and Injunctions, some customs which savoured of the old religion may have been kept up in places where the feeling in favour of the new order of things was weak. But nothing done in any churches, cathedral, collegiate, or parish, could change the law as it then stood, or can have the slightest effect on the interpretation which is now to be put on the Prayer Book enforced by the last Act of Uniformity. We feel the most perfect confidence that any court deciding on sound legal principles would support this view.*

The Report of the Committee of the Lower House of Convocation on the ritual question, we may here observe, is not a document which, in a legal point of view, carries much authority

* Since the above remarks were written, it has been stated in some of the daily newspapers that a case has been submitted, by a society called the English Church Union, to several eminent counsel, and that their opinion has been prepared, and is in direct antagonism to the opinion on which we have observed in the preceding pages, "Affirming the legality of vestments, and most of the peculiar practices for which the High Church party contend." Up to the time of sending this article to press we have not seen a copy of this opinion; and we must be allowed to express a doubt whether, if such an opinion has been "prepared," it has been signed by all the learned gentlemen whose names have been mentioned. We shall be very much surprised if it turns out that it has been so signed.

with it. It is obviously the composition of men who feel the difficulties of the case very strongly, without seeing their way out of them very clearly. As an attempt at a compromise it is not eminently successful, because the case is not one which really admits of a compromise. The only wise policy, we think, is to allow the ritualists to go on as they are doing. They are not likely, on any sober view of the matter, to do much harm, and on their own estimate, they are likely to do a great deal of good. The best way to deal with enthusiasts of this sort is to give them full liberty of action. Many of their practices are, we think, illegal, but they are not of such a character as to require that the strong arm of the law should be put in force against them. Their practices do not outstrip their doctrines, and their doctrines are only the natural, if not the necessary, development of those which are held by men who consider themselves as the soundest and most orthodox of churchmen.

We can very well anticipate an objection that may be taken to our view of the opinion on which we have commented, in holding it to be wrong in the answer to the first question, but right in the answer to the second. It may be said that as the dresses and the observances together, are both equally connected with one doctrinal system, and both equally go to make up one system of ritual, it would introduce a strange anomaly to allow the former and disallow the latter. No doubt, if the scheme of the Church of England throughout were uniform and consistent, *simplex duntaxat et unum*, there would be some force in this objection. But, in reality, it is only adding another anomaly to the many that must be acknowledged to exist in our ecclesiastical polity, and which, whether they proceeded from accident or design, have tended materially to promote the good estate of the Church of England. While the Crown and the Parliament form the real executive and legislative authorities in the Church, the clergy are not the mere pensioners of the State, and a certain "native vigour" is seemingly attributed to them. Notwithstanding all the refinements which have been attempted to be

introduced into the interpretation of the Articles, their contradiction to some parts of the Prayer Book still remains patent and flagrant. Definitions of a "good Churchman," irreconcilable with each other, are still given by different parties in the Church, according as they look to Rome or to Geneva, or some other place; and much is no doubt to be said in favour of each of them. Our view, therefore, we maintain, is perfectly consistent with the general scheme of the Church of England, which gives something here and takes something there—now stopping short where it might have been supposed that it would advance, and now advancing where it might have been expected to stop. What wonder would it be, we may well ask, if the law of the Church allowed the dresses prescribed by the first Prayer Book of Edward VI., but disallowed the lighted candles, the incense, and the wafers?

And well, we think, would it be for the safety and welfare of the Church if such should be admitted to be the case, for then the ritualists would be deemed to have as secure a place within her borders as the Evangelicals, or any other party which has had its day and lost its influence because it went beyond the limits which sound discretion would have dictated. If the dresses were once admitted to be lawful, we should hear no more of prosecutions for lighting candles on the altars, and darkening the air with clouds of incense. The forbearance shown by the old parties towards each other, because each knew that it lacked something, would then equally exist with respect to the new party; and those who stand aloof from all parties would enjoy the same liberty which they at present have, but with a still stronger security for its continuance. The *concordia discors*, with which the enemies of the Church of England reproach her, would still remain, what her best friends know it to be, her highest privilege and her peculiar blessing. Whether it is right that the comprehensive character of a great national church should depend only on contradictory statements and provisions in the articles and

formularies, is a matter which may well give rise to grave and serious doubts. But under this system the Church of England has flourished and still flourishes, despite all her internal discords. She was never stronger in her influence on the people of this country than in this present time of division and contention, and we cannot suppose that if a better feeling were to exist in parties with respect to each other, this influence would be lessened. But though we are quite willing that matters should continue on the footing we have indicated, a measure giving parliamentary sanction to a comprehensive and liberal system would, we certainly think, be better still. The present feeling of the clergy, however, is too strong against parliamentary interference to warrant any such attempt, although we cannot refrain from saying to such of our readers as know the real constitution of the Church of England legally and historically—in view of the affected prudery now so common on this matter—*risum teneatis, amici?*

ART V.—ROYAL COMMISSION ON THE LAWS OF MARRIAGE.

IN our August number last year, we described the objects of the above imperial commission which, as we then observed, has truly a comprehensive scope. It embraces marriages, not only in England, Scotland, and Ireland, but in India and the colonies, as well as the laws of the United Kingdom which relate to marriages by British subjects in foreign countries. This, of course, includes the difficult questions which arise as to what are called *in fraudem* marriages, contracted by parties resorting to other states, in the hope of escaping impediments insuperable in their own.

From the printed parliamentary papers we collect that the first step taken by the commissioners was to obtain from competent authorities statements of the different marriage

laws which prevail in England, Scotland, and Ireland, respectively.

The second step was to elicit the opinions entertained in various parts of the three kingdoms with respect to the practical working of the laws in question, the defects and blemishes attributed to them, and the remedies proposed. Important communications have, we understand, been received from bishops and other distinguished clergymen of the Established and of the Roman Catholic Church, as well as from the ministers of religion of the Presbyterian and Dissenting bodies throughout the kingdom, and also from lay officials and other individuals of note, to whom it was deemed proper and expedient to apply for information. The commissioners held several meetings to consider these communications, and to give directions for the further prosecution of the inquiry. But it was not till February that they commenced the oral examination of witnesses, which is still proceeding.

In the meantime we may mention that one of the first topics as to which the commissioners desired precise information respected the working of the "Code Napoleon" with reference to the constitution and proof of marriage, especially in Roman Catholic countries. This, of course, was with a view mainly to Ireland, where the law on this subject is, from the differences of religion, replete with distracting perplexities, not to say absurdities. A careful inquiry was instituted, and the following is the result :—

"The Code Napoleon requires that all marriages shall be entered into before the civil magistrate, usually the mayor or his deputy, at the Hotel de Ville, or Maison Communale of the Arrondissement ; and no minister of religion can officiate or interfere until a certificate has been presented to him, certifying that the parties have already contracted matrimony in the mode prescribed.

"Any minister of religion who shall venture to solemnise a marriage without the sanction of this previous civil act, is punishable with fine and imprisonment.

"Persons, therefore, who live under the Code Napoleon, must

either continue single, or be married by a purely civil ceremony of the shortest and simplest description.

"That civil ceremony makes the marriage, in the eye of the law, to all intents and purposes complete.

"Those concerned, however, are not required or expected to rest satisfied with it. On the contrary, every facility (not to say encouragement) is afforded for the subsequent interposition of the sacred office.

"The certificate of the secular union is granted expressly *pour servir aux cérémonies religieuses*; and it issues without charge where the parties are in poverty.

"If they are Roman Catholics (generally the case under the Code Napoleon), they, at the close of the civil ceremony, repair forthwith to church, where the priest, on receiving the indispensable certificate, unites spiritually at the altar those who have already been united civilly at the Hotel de Ville; thereby (in the words of the First Consul*) 'impressing the seal of religion on that union which has already received the seal of the law.'

"The priest is naturally soothed and gratified by the ready and pious obedience of his faithful disciples, who, under the force of religious obligation, seek from the holy ordinance that comforting assurance which befits the most solemn of engagements. Other considerations, too, of a more worldly character, may be supposed to operate on the French and Belgian mind, such as the credit and respectability which are retained or acquired by complying with the dictates of traditional decorum.

"The average result is that, in at least 95 cases out of every 100 in France, the parties who contract before the civil officer ask afterwards, and receive the sacerdotal benediction. As to Belgium, there is no return, but it is certain that the same deferential sentiment predominates in both countries.

"If there are some (certainly not many) who repose on the civil ceremony without renewing their vows in any place of worship, the effect is simply that the sacred ordinance is restricted to those who approach it reverentially.

"Where any canonical impediment appears, the minister of reli-

* Discussions du Code Napoleon, par Jouneau et Solon, vol. i. 253.

gion withholds his rite. Three publications of banns usually precede the religious ceremony.

“The antecedent public notification that a marriage between given parties is intended ; the reception and the disposal of objections to the proposed union ; the acceptance of the required consents from relatives ; the administration of the civil rite, whereby the marriage is completed ; the formal recording of it in duplicate registers committed to the custody of distinct officials : finally, the preservation of the evidence which shall prove the marriage in the event of any subsequent challenge or inquiry ; all these are matters which the Code Napoleon places exclusively in the hands of civil functionaries, whose inquisitorial vigilance and circumspection are said to render clandestinity and deception next to an impossibility.

“How these important ends are attained the following propositions will indicate :—

- “1. Before the celebration of a marriage, the civil officer shall make two distinct publications of it, and shall announce, by placards fixed and retained on the door of the town hall, the christian names, surnames, professions, and domiciles of the parties.
- “2. One of the publications shall be on a Sunday, and there shall be an interval of eight days between each.
- “3. The marriage shall not be celebrated till after the third day from the second publication.
- “4. The two publications shall be made in the municipalities of the places where the contracting parties shall have their respective domiciles.
- “5. If the contracting parties, or either of them, be under the authority of others, the publication shall be made in the municipalities of the domicile of those others.
- “6. Evidence of the ages of the parties must be supplied, to show how far they are under or free from authority.
- “7. The son is absolutely incapable of marriage, even with the consent of parents, until he has attained the age of 18 years complete, and the daughter, until she has attained the age of 15 years complete.
- “8. From these respective ages, until the son is 25 and the daughter 21, marriage may take place with consent, but not without.

- "9. From the respective ages of 25 and 21, the advice of father and mother, or of grandfather and grandmother, or of relatives, must be asked. This obligation lasts through life, its object being to elicit objections from those most likely to know and advance them.
- "10. The advice asked need not be given, and if given, need not be followed. The law is satisfied by what is called the 'respectful act' of soliciting it.
- "11. After a short interval, if no response and no objection appear, the marriage may take place.
- "12. Acts of opposition shall be signed and communicated to the parties at their domicile.
- "13. The civil officer shall pause till all impediments and doubts disappear.
- "14. When the marriage has not been celebrated within a year, the publications shall be repeated.
- "15. The civil officer neglecting these precautions and formalities, shall be punished by fine and imprisonment.

*"Form of the Civil Ceremony of Marriage at the Hotel de Ville, of the Town of —(En séance publique).—*The Mayor, seated in state and surrounded by officials, being attended by the parties seeking matrimony, their parents, relatives, and friends, proceeds to read and examine the documents which show that all the requisite preliminary notices and formalities have been duly carried out. He then addresses to the parties, by way of admonition, certain passages from the Code Civil, namely these—

- "1. Married persons owe to each other fidelity, succour, and assistance.
- "2. The husband owes protection to his wife, the wife, obedience to her husband.
- "3. The wife is obliged to live with her husband, and to follow him to every place where he may judge it convenient to reside; the husband is obliged to receive her and to furnish her with everything necessary for the wants of life according to his means and station.

"These cardinal maxims being enunciated with emphasis, the effective scene in the formality next ensues as follows :—

"The Mayor—(Addressing the mother of the bridegroom.) Do

you, Madame Dufour, consent to the marriage of M. Pierre Dufour, your son, with Mlle. Marie Talleux here present ?

"*Madame Dufour.*—I do.

"*The Mayor.*—(Addressing the father of the bride.) Do you, M. Talleux, consent to the marriage of Mlle. Marie Talleux, your daughter, with M. Pierre Dufour here present ?

"*M. Talleux.*—I do.

"*The Mayor.*—(Addressing the bridegroom.) Do you, M. Pierre Dufour, declare that you take for wife Mlle. Marie Talleux here present ?

"*M. Pierre Dufour.*—I do.

"*The Mayor.*—Do you, Mlle. Marie Talleux, declare that you take for husband M. Pierre Dufour here present ?

"*Mlle. Marie Dufour.*—I do.

"*The Mayor.*—In the name of the law, I declare that M. Pierre Dufour and Mlle. Marie Talleux are united by marriage.

"This closes the ceremony, the parties on receipt of their certificate withdrawing from the mayor and resorting forthwith to the 'minister of religion.'

"*Certificate of the Civil Ceremony of Marriage, granted in order to Authorise its Religious Solemnisation.*—We, the undersigned Mayor of the town of —, hereby certify that M. Pierre Dufour [*describing him*] has contracted marriage before us this day, in the Maison Communale, with the Demoiselle Marie Talleux [*describing her*]. This certificate, delivered the 2nd September, 1865, is to serve for the purpose of a religious ceremony, and is granted on unstamped paper by reason of poverty. A. B., *Mayor.*"

Throughout France and Belgium the system here described has existed in full force since 1803. It has also been the law of Holland for the same period ; and a statute making it the exclusive rule in the kingdom of Italy came into operation on the 1st of last January.

As to the acceptance and probable operation of the law establishing civil marriages in the kingdom of Italy, the correspondent of the *Daily News*, on the 8th of January last, gave the following interesting representation :—

"The 'Syndic' of Florence makes known to the citizens that 'on

the first of January all registry of births, of citizenship, of marriage, and of death, must be declared, celebrated, and reduced to writing, in the presence of a civil officer in the municipal palace, without charge or expense of any kind.' The conditions necessary for the civil marriage thus performed are, according to the law of the 25th of June, 1865, the following :—

"The celebration of marriage must be preceded by two public announcements, to be made by the civil officer.

"These publications must be made in the commune in which each of the contracting parties has his or her residence. If the period of such residence be less than a year, the publications must be made in the commune previously resided in.

"The publications are to be made at the door of the communal house on two successive Sundays. The 'act' (i. e., written document stating this publication) shall remain placarded during the interval between these two publications, and for three days after the last of them.

"The demand for publication of banns must be made by both the contracting parties personally, or by the father or guardian, or by a person furnished with a special and authenticated mandate of procuracy by them.

"The immediate practical change will be far greater than any which the introduction of the permissive civil marriage has caused with us.

"The new marriage law here is not permissive, but, most judiciously and rightly in theory, compulsory. The law knows nothing of any contract, or of any evidence of any contract, over which it has not itself presided, and guaranteed the authenticity of, by its own sanction. Every one, high or low, must go before the civil officer in order to contract marriage.

"But in the second place, the sentiments and feelings of the populations are prepared, to a very far greater extent than with us, to take kindly to and approve of the new law. Few marriages in Italy, I think, save among quite the upper ten thousand and the wealthy, will be found henceforth to require any ecclesiastical ceremony to render them perfectly satisfactory to both the contracting parties. No desire of imitating the social fashions of the great and the rich will induce the bulk of the Italian people to incur an expense

for the attaining of an end which can be to all intents and purposes attained without it. And the priest will henceforth be effectually estopped from the most powerful and efficient of all the means at his disposal for interference with the social life and concerns of the laity."

About a fortnight later, on the 26th of January last, the correspondent of the *Times* thus describes the sensation created by the new law, and the consequent terrors held out by the clergy.

"With the first day of the year 1866 the new Civil Marriage law came into force, and notices of intended unions, stuck up outside the Palace of Municipality have, since then, daily attracted groups of curious readers. The first three marriages under this act took place two days ago, the first of all being between a Catholic Captain of Bersaglieri and an English spinster ; the second between two Catholics ; and the third between a Jew and a Catholic. In some parts of Italy the priests strive to deter their congregations from availing themselves of the Civil Marriage Act, by assuring them that such unions are null, that the children born of them will be illegitimate, and that persons so married will, upon their death, be refused burial in consecrated ground. A case of such attempted intimidation is cited by the papers as having occurred last Sunday at Salso Maggiore ; and it appears that the Syndic of the place drew up a report of the conduct of the priest, and forwarded it to the law officers of the Crown."

We cannot doubt that our commissioners on the laws of marriage will hold the example of uniformity furnished by this report and by these extracts, as at least worthy of their serious attention if not of their adoption. Civil marriages are indeed allowed in this country. But the question is, ought they to be made imperative?

ART. VI.—THE TRIAL OF JEFFERSON DAVIS.

NOT until at least another three months have passed by may we expect that the trial of Jefferson Davis, so long delayed and so often postponed, will have become matter of history ; nor, coming as it does after so many nearer and more engrossing topics, can it now be expected to engage the attention of England to so great a degree as if it had taken place a few months back, and as its importance well deserves. Nevertheless, the issues that it contains, and the questions arising out of those issues, are not only of such immediate consequence to American citizens and to those who take a special interest in the affairs of the United States, but also of such general political interest to all, that it is neither out of place nor premature to consider them while we can do so unbiassed in any way by the result or by the conduct of the trial. Accordingly it is our present object to note some of the principal circumstances by which that result ought to be affected, supposing it to be made dependent upon the real questions at issue, and not upon any mere technicalities or popular sympathies. It is of course difficult, or rather impossible, to discuss all these circumstances at all fully in anything like a short space ; and we shall therefore confine ourselves to noticing, as briefly as possible, those points only which appear to us to be absolutely essential to the formation of a right idea of the nature of the crime of which Mr. Davis is alleged to be guilty, and of the line of defence which he will probably adopt.

Contrary to the opinion of the extreme Radical party, that he ought to be tried by martial law, it is settled that Mr. Davis is to be tried at Richmond, by jury. The material part of the indictment against him is, that he—

“Being an inhabitant of, and residing within, the United States, and owing allegiance and fidelity to the said United States of

America, most wickedly, maliciously, and traitorously, did ordain, prepare, levy, and carry on war against the said United States of America, contrary to the duty of the allegiance and fidelity of the said Jefferson Davis."

An overt act is also alleged, in order to bring the offence within the provisions of the constitution. This indictment was submitted to a grand jury summoned at Norfolk, and a true Bill found, two voices only being dissentient.

Now the circumstances under which Mr. Davis became the elected President of the so-called Confederate States, and his various subsequent acts in that capacity, need not be discussed here. There can, in this case, be no real question of mere fact. So far as facts go, the indictment is amply supported: and, if the law of treason in the United States approached to anything like the certainty of the law of treason in any other political system that has ever existed, it would have been altogether unnecessary to discuss the trial at all. Its result would have been absolutely certain, one way or another. Either the law would have been clearly understood as being that any citizen of any of the United States levying war against the central government is a rebel and a traitor, or the law would have been that any one state, and therefore the citizens of any one state, acting under its authority, may carry on war against any or all of the others, just as any one member of an alliance of independent nations may break from the alliance and carry on war, and authorise its subjects to carry on war, against the rest. In this latter case, there could be no question of rebellion or of treason at all. But while treason is, by the terms of the constitution (Art. iii., sec. iii., 1), said to consist in levying war against the United States, and in adhering to and giving aid and comfort to their enemies, history has overwhelmed this simple text with such difficult and numberless glosses as to have given this extraordinary quality to the constitution of the United States—that it is almost impossible to say of almost any act of war against the central government, either that it does or does not come

within the definition of treason, without at the same time taking into account many circumstances that at first sight appear altogether foreign to the matter. One question, therefore, at issue in the coming trial of Mr. Davis is a very large one indeed—so large, that to treat it fully and properly, one ought to consider nearly the whole of the history of the United States since they became independent.

It has been long discovered by American politicians that the constitution, so long regarded as an institution of almost divine authority, is, in reality, full of defects, caused by its being made up, to a very great extent, of compromises, necessary at a time when union of any kind was the one thing needful to be secured, but which, in order to secure union at any price, left open nearly all the great questions about which there was any important diversity of opinion. We cannot suppose that the great fathers of the constitution were unaware of these defects; on the contrary, we have ample proof, from their speeches and letters, that the constitution was even intended to be, to a great extent, only provisional—not in spirit yet certainly in detail—that it was intended as a starting-point from which a perfect system might gradually be developed. Finality was far from their thoughts. They did what they could; they brought about sufficient unity of spirit and of action to make sure of independence externally, but the settlement of great internal questions they left to be worked out at leisure, during the period of liberty and peace that they wished to leave behind them. Now among the greatest of the defects to which we have alluded is the want of a full and definite statement of the relation borne by the separate states to each other, and to their common government.

At the very outset it must not be forgotten that the very idea of union took its rise from a purely external necessity. When the various North American colonies revolted from England, they naturally acted together and pursued in common their common object. Probably the idea of one great nation under one and the same government was, at first, scarcely

thought of, even if it was thought of at all. Indeed, afterwards, when independence was established, it was expressly stated in the articles of confederation and perpetual union of 1778 that each state was to retain its sovereignty, freedom, and independence. The idea of the United States seems to have been that of an alliance of governments bound by treaty—not in the least of one nation under one government supported by the usual civil sanctions. But of course it could not help occurring to any far-seeing statesman that this was, at most, but a half-idea. Treaties of alliance are but weak bonds, at best. To hold a political society together is required one central, sovereign authority. The common interest cannot be maintained when the conflicting interests of each member of the community are allowed equal weight—and this consideration becomes stronger when the original purpose of safety becomes lost in the possibility of greatness. The idea of Washington himself seems to have been that the various states should be merged in one great whole—that all differences and distinctions among them should, in course of time, be done away with altogether. He spoke to his hearers of their “common country”—of the title, “American,” as their common national name. He wished for one empire—not “a constituency of thirty empires” of which an American writer speaks. Many, of course, held to the old condition of things—thought much of their own particular state, and cared little for the rest, which were often completely foreign to each other in race and feeling; were led by the same patriotism that had caused them to throw off the despotism of England to look with jealousy upon the possible substitution of what might become a yet more galling and foreign tyranny at home. Most of the states could have had at the outset but few sympathies, and, when they came into real contact with one another, must have discovered that they had many antipathies. It only seemed natural that those who had successfully fought for self-government should keep it; and self-government seemed, most obvi-

ously, separate state government. That party which took the longer and wider view—the party of Washington and of Hamilton—though it had the most influence in framing the constitution of 1797, and succeeded in embodying therein its own spirit, was, nevertheless, not sufficiently powerful to carry out all the legitimate conclusions to be drawn from its principles—not all, even, of those conclusions which, logically speaking, were most necessary. Thus, in the convention in which the constitution was drawn up, it was settled that all powers not delegated to the general government should be reserved to the separate states that originally possessed them. Now among the powers that one would think must of necessity attach to any government in the world—that are most essential to the preservation of any government—is the power of putting down by the strong hand all attempts to subvert it on the part of those who are subject to it. When the power of the general government was made supreme, one would, therefore, also think that the power of employing the general force of those subject to its supremacy against any member of the Union resisting its authority would have been made subservient to its support. The express grant of this power was, in fact, proposed, but its insertion in the constitution was negatived. This being so, the strange consequence would naturally have seemed to follow, that internal war, carried on by any state against the general government, should be treated merely as war and not as rebellion, and so be subject to the laws of war alone. But here the spirit of compromise stepped in—perhaps, at the time, necessarily and rightly—and this view not being formally accepted the whole question was left altogether without any expressed decision one way or the other. Thus, although supreme power was certainly delegated to the general government, the power to treat a state under any circumstances as rebellious was not given to it. By the rejection of the second proposition that power was not, indeed, denied, but it was, at the same time, far from being expressed.

This unfortunate compromise was the origin of the "States' Rights" party, and of the arguments by which the Southern Confederacy justified their conduct during the late civil war. It is upon this alleged right of any state or states to levy war against the Union without thereby itself incurring, or causing its citizens to incur, the penalties of treason, that we believe the friends of Jefferson Davis now rest one of their principal lines of defence.

We may accordingly suppose his counsel arguing thus:—The constitution of the United States contains no provision by virtue of which their central government may call forth the force of the Union against any member of the Union failing to observe a duty, or supposed duty, constitutionally imposed. On the contrary, in declining to make any such provision the framers of the constitution refused to anticipate the rebellion of a state, and thus, at all events, did not acknowledge the possibility of such rebellion. In fact, they did not sanction the allegiance of a state to the Union; and allegiance without a sanction is no allegiance at all. This being the case, if a state levies war against the Union, such war must be governed, not by any law of treason, but by the law of nations, and the law of nations deals, not with rebels and traitors, but with prisoners of war.

Now there are certainly many facts, important in themselves, which appear to support this argument.* Though the late civil war is the first occasion of an attempt on the part of a state to separate itself from the Union by force of arms, it is by no means the first time that a state has authoritatively opposed the whole body in other ways, not only without incurring any penalties, but with a tacit or expressed acknowledgement of its right to do so. The celebrated Dred Scott case is often brought forward as an illustration of this, and others, more or less to the point, might easily be produced. But upon these cases it is not necessary to dwell. They do not really affect the matter, even if they were not in general capable of being accounted for on the ground of their being

nothing more than minor compromises. A question is not capable of being affected by precedents when the authority of those precedents is not admitted—when their value is part of the very issue to which they relate.

It is, therefore, on the broad question, as affected by the constitution itself of the United States, that the advocates of Mr. Davis must take their stand. They must, in effect, under the view that we are now considering, argue that the connection of the United States is nothing more than a voluntary alliance. If this be so, it would be idle to deny that, supposing any state or number of states desiring to exercise their right—for under this view it would amount to a right—of leaving the federation, were opposed by the rest, appeal might be made to the only tribunal possible—that of war. But then it must, on the other hand, be remembered that war, in such a case as this is, really a trial of right—not merely of power—for, without power, a right cannot be said to exist at all. Moreover, when war is once accepted as a tribunal, its decision must be accepted as final. Whatever may have been the nature of an alleged right before its decision, that right must, at all events, cease to exist as soon as the existence of all means of enforcing it ceases. Of course this general doctrine is equally applicable to both sides of the question. The same may be said of the alleged right on the part of any number of states to compel the rest to remain, against their will, under a particular government. Had the so-called Confederate States succeeded in their attempt, their right to have made the attempt would have been practically justified. But, as it is, any court representing the government of the United States would only stultify that government and itself by acquitting Mr. Davis on the ground that his state had a right to take up arms. It was to enforce the exactly opposite view that the United States government fought so long; and it would be too great a piece of absurdity for us to suppose for an instant that the victory, so hardly gained in the field of battle, should be thrown away in a court of law. Upon this point

both sides have already appealed to the last resort—that is the sword—and the sword has decided against the States' Rights party. It is therefore the sole province of a court of justice, so far as this point is concerned, to carry out what has been practically decided already. Whether or no the constitution originally gave to the central government the right to put down rebellion against itself by means of the force of the Union, there can be no question now. No doubt, as far as we have yet carried the question, both views were probable, but success is the only test that we can make use of to decide on which side the truth lies in a war of opinion in which the very question at issue is—who is the strongest?

In making these remarks we do not wish to be understood as asserting broadly that success is the test of right in politics, but only that, in this particular case, it is not open to the judges of Mr. Davis to decide against success. But we may also go yet farther, and argue that, independently of success, the right of self-defence and self-assertion must be inherent in every government not being a mere fiction. When the framers of the constitution made the general government supreme, can it be said that merely because the right to compel a state to observe its duty was not expressly delegated to it, therefore it was to be at the mercy of any state, or combination of states, that might choose to take up arms against it? Suppose, for instance, that a state had refused to obey some actual law imposed on it by the general government, and had forcibly resisted the execution of that law. Surely the condition of the supreme government of the United States would be a strange exception to that of all supreme governments that have ever existed, or have been founded upon any theory whatever, if it contained the power of legislation without the power to compel obedience to its laws. Government, upon such conditions, cannot exist. If a duty is held by the supreme legislature to be incumbent upon those who are subject to it, it must perforce infer that its subjects are also bound to observe that duty under pain of either being compelled to observe it, or of

being punished for not doing so. Rightly or wrongly, the supreme general government of the United States held it to be the duty of each state to remain in the union; and how can a political or legal duty be said to exist, unless there also exists, on the part of those who possess the corresponding right, a means of compelling the observance of that duty? This is a truth, or rather truism, which is sometimes unaccountably overlooked. So much has been said of state rights that it would sometimes seem to be thought that the separate states had rights only and no duties at all, and that the relation between the states and the Union is a mere fiction, unsupported by the only means by which any political society whatever can be upheld. It would, on the contrary, be really strange if the right to coerce a refractory state had been expressly given to the supreme government by the constitution, since it is so obviously to be inferred. No theory can be admitted that is inconsistent with this necessary right, and the theory of the right of voluntary secession is clearly altogether inconsistent with it. In the words of President Johnson, "it is not one of the rights of any state to renounce its own place in the union, or to nullify the laws of the Union." In the words of the Constitution, "No state shall enter into any treaty, alliance, or confederation." (*Art. I., sec. X., 1.*) But these expressions would be meaningless unless the Union has the right forcibly to prevent a state from seceding or from entering into a separate confederation. Whatever, therefore, private views may be, it is not in the power of any court before which Mr. Davis could be tried either to assert that any state had the right to secede, or to deny that the United States had the right to prevent secession.

But, it may then be said, if it is not open to the court to go to such an extent as this, it may be fairly considered in what way the allegiance that a person bears to his own state and that which he bears to the union are consistent. It does not follow that, because a state has no right to secede from the Union, therefore, when it has once seceded, its own citizens are

not justified in supporting it. The state, it may be admitted, considered as a unit of the nation, may commit treason, but it may, at the same time, have the quality of sheltering any private citizen under its corporate character. Under this aspect, the state itself must be regarded as the guilty person; the state is the criminal, to be punished and brought back into the Union; but the allegiance that each man bears to his state obliges him to support its action. The allegiance of an American citizen is, above all things, due to his own state. In short, the argument amounts to this—the state of which Mr. Davis was a citizen may have acted wrongly in [separating] from the rest, but he himself would have been a rebel had he put himself in opposition to it. ✓

Now, of course, this view is nothing more or less than an extreme development of the doctrine of States' Rights. It depends upon several propositions, some of which are inconsistent with the view to which the court is necessarily committed, some with the known policy of the present government. The principal theory on which it depends is that to which we have already alluded—the theory that the various states are sovereign and independent of each other, united only by treaty, and subject only to such common quasi-government as can ever be imposed by treaty:—that is to say, a government unsanctioned, because dependent only upon the will of each individual subject, and fictitious because unsanctioned. In its origin, no doubt, the Union was a defensive alliance against the common enemy; but we have seen that it is impossible to consider it as such now. No doubt the theory of the first confederation was that the various states were independent of each other, and were only merged in the Union so far as their relation to foreign nations was affected. If we suppose this theory still to prevail, the different states bear to each other the relation of a number of nations bound by treaty. If one quits the alliance, it may itself, as a body, be guilty of a breach of faith; but the conduct of any of its individual subjects would not only be merged in that of its government, ✓

but any of its subjects would be absolutely guilty of treason if he were to support his country's enemies against his country in any course, right or wrong, and he could, in such a case, be liable, on the part of the other parties to the treaty, to nothing harsher than the laws of war. But this theory, depending as it does upon an extreme view of the rights of states—so extreme that we cannot suppose the possibility of its being entertained by the government or courts of the United States—is met by what we consider to be a still stronger and more appropriate argument. A state, in its corporate capacity, according to the prevailing view as expressed by the president, cannot be guilty of treason. No matter to what extent its inhabitants may carry on war against the general government—no matter how much they may desire to separate their state from the Union—they cannot legally separate it, for the Union is by law indivisible. How can a state, or any other person, real or fictitious, be held guilty of doing what it not only has never done, but what it was incapable even of attempting? Now treason, on the part of a state, was never provided for by the constitution; such a possibility was never even thought of. Since the Union is declared to be one and indivisible, state-treason would be like the absurd case of a legal person committing treason against itself. The inhabitants of a state may revolt or commit treason, but not the abstraction which represents them. This view has always been held, more or less. The Northern States, during the war, were fighting, not to bring back the Confederate States into the Union, for they had never ceased legally to belong to it, but to bring back their revolted inhabitants into submission to the government of the Union. This argument is not founded upon a mere logical fiction. If, as we have seen to be the case, the theory of an alliance of independent states is inadmissible, the inhabitants of the various states are subjects, not only of their respective state-governments, but also of the Union; and, as such, may be guilty of treason against the Union as well as against their own state. There must, in short, be such a thing as treason against the Union, for the

Union is a government, not a treaty, and, as a government, must be sanctioned and supported—there is, in fact, such a thing by the express terms of the constitution. Now, since such a thing exists, who are liable to be guilty of and punished for it? Not the states, as we have seen; therefore, it must be the inhabitants of the states.

The real question at which we must at last arrive is, therefore, this: Which claims the first allegiance of a citizen—the supreme general government of the Union, or the special government of his own particular state, when the claims of the two become inconsistent? The test by which this difficulty may be solved is a second question: With whom is the right of interpreting the constitution, so far as it relates to the relation of the Union, as a whole, to its component parts? Of course we know what answer has been practically given. But in theory, also, with whom can this right lie but in the common government? In point of fact, all courts throughout the land are bound by the judicial construction of the constitution as given by the supreme court. Any act of state legislation may be set aside by a decision of that court to the effect that it is unconstitutional. What a monstrous absurdity it would be if a body of men who are obliged to take the interpretation of constitutional law from a higher body should have the interpretation of the most important part of that law exceptionally left in their own hands—if it were the right of each separate state to define its own relation to the common government in any way it might please from time to time. It is impossible to deny that the attempt to do so has sometimes been made, but no amount of exceptions can outweigh the principle. We may even, we think, go almost so far as to place the extreme supporters of States' Rights in a dilemma, by arguing that even if we regard the Union in the light of an alliance, and the constitution in that of a mere treaty, then that the supreme government must be regarded in the light of a standing congress having the right and duty of interpreting the treaty, and of carrying out its provisions. *A fortiori* it

must have that right and duty under any other theory. The right to interpret the acts of a supreme legislature must exist somewhere; and it is most obvious that the right should exist in the superior rather than the inferior courts that derive their powers from that legislature. If not, the central government would in this manner also be rendered fictitious whenever it might come into collision with a subject government. Let a citizen observe his allegiance to his own state, but first let him observe allegiance to that to which his state is subject.

We think, then, that as a state cannot be itself considered as being subject to the law of treason, it therefore follows that it cannot interpose the allegiance due to itself between its rebellious citizens and the punishment due to them—that, in the words of President Johnson's first message, a state cannot "screen the individual citizens who may have committed treason." Without going the whole length of a decision that, it seems, has been given by a court in East Tennessee, "that a man by one single act of adherence to the South is guilty of double treason—against the United States and against the state," we may deduce this corollary from the federal theory—that it is the individual, not the state, that is guilty whenever treason has been committed, and that treason is an offence not to be covered by the authority of the state.

There is, however, one more argument often brought forward, not so much in favour of the rights alleged by the southern states as to excuse their citizens from punishment, and which, for obvious reasons, has been much favoured by the friends of the confederacy in Europe. As, however, it is our object to consider the present subject as much as possible from an internal point of view, we need do little more than merely allude to it. It is this:—That whatever the nature of their rights may have been originally, those states became, in the course of the war, an independent power *de facto*, and that it became the duty of both sides to treat all who were taken prisoners during the struggle as prisoners of war. If this view could have been adopted the result would have been

a compromise, perhaps in some respects satisfactory. But it is a view quite inconsistent with the federal theory. Moreover it depends upon a question of fact; did the United States ever recognise the independence of the confederacy? On the contrary, that government and the states that remained faithful to it have been consistent throughout in never admitting the southern rebellion to be a war; and we certainly cannot expect them to do so now. Rebels may become strong enough to oblige their opponents to treat them practically as alien enemies when they are engaged in actual warfare, but something more is required to constitute their recognition as an independent state. The character of the confederate government, as to whether it really at any period possessed sufficient strength and stability to be considered a belligerent power, may have been a question for foreign nations, but never was, and certainly is not, a question for the lawyers of the Union. To them, the question whether Mr. Davis is a traitor or not must depend solely upon their construction of the constitution.

The chief question, then, at issue in this trial is that which relates to the duty on the part of a citizen as to the allegiance which he bears to his own state. Probably there is not much doubt as to how this issue would be decided; but whatever the result of the trial may be, and whether it is certain or uncertain, it is to be hoped that it will not pass off upon merely technical grounds. The trial of Jefferson Davis will afford the best possible opportunity for the legal authorities of the United States to discuss fully and accurately the real powers and limits of the much-misunderstood constitution as to the various states considered in relation to each other and to the Union as a whole.

To decide either accurately or fully upon any American question, is, for us in England, a very difficult task, by reason of the difficulty that we find in properly sympathising with and understanding the feelings and thoughts engaged on either side. But the answer to the question now before us

✓ seems, when stripped of all considerations that are manifestly immaterial, so much to resolve itself into one of general principle, that the task of coming to a just opinion concerning it appears not altogether impossible. Our opinion, accordingly, is, that upon the merits of the case, Jefferson Davis ought to be convicted of treason to the Union, if it were only for the reasons already given. But what should be his punishment, or whether he should not, like so many of his fellow-rebels, receive his pardon upon a formal conviction, is another question, and is dependent, of course, not so much upon the nature, as upon the degree, of his guilt. We cannot, however, help remembering that it was his skill, his spirit, and his character, that, as much as anything, animated the whole conduct of the Confederate States; that, had it not been for him, numbers would never have offended, and the consequent mischief would have been infinitely less. Granting his motives to have been the best, still we must, in cases of this kind, judge, not by motives, but by acts. Doubtless, in all purely political offences, the greater number of offenders are animated by the best of motives. If motive is admitted as an excuse in such cases, the preservation of order would be impossible.

What is required of a good citizen everywhere is, that he should be willing to sacrifice many of what he firmly and honestly believes to be his rights—that he should be willing to sacrifice even many of what he believes to be the rights of others—in order to preserve that greatest political right of all, the right of all to live in peace and order. Society is built up of compromises between the principle of order and the principle of liberty. To respect the latter, is the great duty of all rulers; to respect the former, the great duty of all subjects. How subjects ought to act when they suppose their liberties to be infringed, varies with circumstances; but there is no doubt as to what should be the part of a strong government in support of the principle of order. While, therefore, it would appear vindictive, and would certainly be impolitic and unjust, to punish in this case with death, as Mr. Sumner

and others appear to desire, it would be a most wrong and dangerous political precedent not to punish at all.

As to what the result of the trial will actually be, it is difficult, in England, to form a guess. Mr. Davis will be tried before judges who will certainly not lean too much in his favour; but, on the other hand, the Virginian jury will more than probably be decidedly inclined to an acquittal. It appears that in trials for treason the accused may challenge thirty-five jurors peremptorily and as many more as he pleases for cause; and that all who have previously formed an opinion that he is guilty are disqualified to serve. From these and other causes, such as the general tone of public opinion, which appears to have gradually veered round from violent hatred of the prisoner to either carelessness or a positive wish for an acquittal, it is not impossible that a conviction may not be obtained. It is naturally felt that Mr. Davis, in supporting the doctrine of secession, was only one of many, and that the accident that he happened to be a man of talent and influence was not a crime. No one can wish to see any offender—much less any merely political offender—and least of all a man of Mr. Davis's character treated unmercifully, and we are therefore glad to observe the better spirit and tone that appear now to be influencing American politics; but there would certainly be cause for regret if this merciful spirit should cause a miscarriage of justice. We should as much object to see an unjust and prejudiced acquittal by a jury as an unjust and prejudiced conviction by a military commission. The latter has happily been rendered impossible; and the only fear now remaining is that the United States may throw away carelessly the due judicial investigation of a great and important constitutional question—a question, the settlement of which is even of more consequence than that any one man, however great and however criminal, should be rightly or wrongly punished or pardoned.

R. E. F.

ART. VII.—THE LAW OF ENGLAND RELATING
TO PURITY OF ELECTIONS.

BY MR. SERJEANT PULLING.

SINCE the last number of the *Law Magazine and Law Review* appeared, the subject of bribery and corrupt practices at the elections of our representatives in Parliament has forced itself on the serious attention of Englishmen, and somewhat awakened them from the apathy which generally prevails with respect to political questions not of a party character.

We must, of course, in a great degree ascribe this awakened interest to the disclosures so lately made before the Election Committees; but though modesty compels us to say little on the effect of our own lucubrations on the subject, it would be mere affectation to disguise the fact that it is the *Law Magazine and Law Review* which has first suggested the only practicable remedy for dealing with the evils of electoral corruption. This is indeed for the most part admitted by those who have since written or spoken on the subject, and in the debate in the House of Commons, Mr. Bernal Osborne succeeded in drawing the attention of Parliament to our suggestions.

The course of public affairs this session must preclude the introduction of any legislative remedy; but another session can hardly elapse before the sincerity of members of the legislature in endeavouring to suppress corrupt practices at the time of their election must be put to the test.

The following Bill has been drawn, founded on the suggestions in our last number. It will, we believe, in all probability, be brought in as soon as the state of public business will admit of it. We publish it, with the view of eliciting the opinions of the many competent critics among the number of the readers of the *Law Magazine and Law Review*. We need

hardly say that any communication on the subject, addressed to the Editor, will have due attention.

A Bill to Amend the Laws relating to Corrupt Practices at Elections.

“Whereas the laws now in force for preventing corrupt practices at elections need amendment, be it enacted as follows :—

“1. Every person who has been legally convicted of any felony, or of attempting to commit any felony, or of a misdemeanour punishable by imprisonment, or has been convicted or adjudged guilty of any fraud or bribery, treating, or undue influence, shall thenceforth be incapacitated from being elected or sitting in Parliament, or on any town council or local board, or on any jury or inquest, or from being elected or appointed to, or holding any office, place, or employment under the Crown, or any municipal or parochial office ; and for ten years next after such conviction or judgment shall be incapacitated from voting at the election of any member to serve in Parliament, or on any town council or local board, and from carrying on any business, profession, or employment requiring a license or certificate.

“2. Any person who, being so incapacitated under section 1 of this Act, shall sit or vote in Parliament, or on any town council or local board, or act in any office, place, or employment under the Crown, or in any municipal or parochial office, or vote or claim to vote at the election of members to serve in Parliament, or on any town council or local board, or shall serve on any jury or inquest, shall be guilty of a misdemeanour, and being convicted thereof, shall be imprisoned and kept to hard labour for the term of one year.

“3. The pecuniary penalties for the offence of bribery, treating, or undue influence, may be recovered by summary proceedings before any court or justice, in manner provided by the Act 11 & 12 Vict., c. 43, to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales, with respect to summary convictions and orders, and it shall be lawful for any such justice to award to the person suing for the same all costs and expenses as to the said justice shall appear to have been reasonably incurred in and about such proceedings.

“4. The barristers appointed to revise the lists of voters for members to serve in Parliament, shall every year, at the time and in manner

directed by the 16th section of the statute 5 & 6 Will. IV., c. 76, hold open courts for the purpose of revising the burgess and freemen's lists of every borough within the district for which they shall be appointed to act as revising barristers, and shall have all the powers and duties of the mayor and assessors under the said Act, and all the duties of the said mayor and assessors incident to such revision shall cease.

"5. The said revising barristers shall have all the powers and duties of justices of the peace in respect to the considering, reforming, and allowing the jury lists ; and shall hold courts for that purpose at the times specified by section 10 of the statute 6 Geo. IV., c. 50 ; and all the powers and duties of justices of the peace in respect of the performance and allowance of the jury lists shall cease.

"6. Whenever it shall be proved before the revising barrister that any person who is, or claims to be, placed on any list or register submitted to him for revision, is disqualified by section 1 of this Act, the revising barrister shall proceed with respect to such persons in the manner and form directed by the 6th section of the 17 & 18 Viet., c. 102, but for the words, 'offence of bribery, treating, or undue influence,' used in the last-mentioned section, there shall be substituted the words 'criminal offences.'

"7. The revising barrister for every county, city, or borough shall be present at every election of members to serve in Parliament for any such county, city, or borough, and shall be the legal adviser and assessor of the returning officer of such county, city, and borough, at every such election, and all acts required to be done at the time of such election by the returning officer of such county, city, or borough, may be done by such revising barrister.

"8. So much of section 68 of the 2 Will. IV., c. 45 as provides for the examination of the poll-books before the final declaration of poll at any election for members to serve in Parliament, shall be repealed, and, in lieu thereof, be it enacted that on the day next but one after the close of the poll at any election of members to serve in Parliament, or, if the last-mentioned day shall be on a Sunday, then on the following Monday, a court shall be held by the revising barrister, and the returning officer shall produce the said poll-books in open court and the revising barrister shall then in open court break the seals thereof, and carefully examine the said poll-books, and enter on a

scrutiny of the votes which were given or tendered at the said election and shall strike out from the said poll-books the names of all persons who at the time of such election were not legally entitled to vote at such election, or who are proved before the said court to have been guilty of bribery, treating, or undue influence, and shall insert therein the names of all persons who at the time of such election were legally entitled to vote, and who tendered their votes for that purpose, and at the conclusion of the said scrutiny shall cast up the names of the voters as they appear in the poll-books so corrected ; shall then, in the presence of the returning officer, openly declare the state of the poll before the returning officer shall make proclamation of the member or members chosen. Provided always that the said court shall be held at some convenient house or building within one mile of the place where the said proclamations are usually made, and shall be opened not later than ten o'clock in the morning, and adjourned, if necessary, after four o'clock in the afternoon, and shall be continued from time to time, subject to such adjournment, until the whole of the business before it has been disposed of, but every such scrutiny shall be concluded within ten days next after the commencement thereof, unless it shall be otherwise ordained, as hereinafter provided.

“ 11. Provided always that if it shall be made to appear to the revising barrister, on entering on the scrutiny of the votes at any election, that bribery, treating, or undue influence, have extensively prevailed at such election, and the revising barrister shall certify to either of the superior courts that the inquiry into the truth thereof cannot be completed within the time hereinbefore provided, it shall be lawful for the said last-mentioned court, or any judge thereof, on being satisfied of the necessity thereof, to order that the said scrutiny shall be extended from time to time to a period to be named by such court or judge.

“ 12. All persons entitled to vote at the election for the county, city, or borough to which any scrutiny relates, shall be entitled to object at the said scrutiny to the vote of any person at such election as being invalid or illegal, on giving, before or after such election, such notice to the person objected to as to the revising barrister shall seem sufficient, but the said court of scrutiny shall have full power to compel the attendance of all persons who voted or claimed

to vote at such election, and of all other persons whose presence may be necessary for the purposes of the said scrutiny, and the production of all deeds, papers, and documents which may be required for the purpose of the said scrutiny, and shall have full power to administer an oath to all such persons examined before the court, and every person taking any oath or affirmation under this Act who shall wilfully swear or affirm falsely shall be deemed guilty of perjury, and on due proof of any person wilfully refusing to attend the said court, or to answer any questions which shall be lawfully put to him, a warrant may be issued under the hand and seal of the revising barrister presiding at such court for the apprehension of such person and commitment to prison until he shall answer such questions, and any person who shall wilfully disturb the proceedings of the said court, or obstruct or prevent any person from attending or giving evidence before the said court, shall be liable to a penalty of £10, and it shall be lawful for the court to commit such person to prison until such penalty is paid; and it shall be the duty of the chief constable, commissioner, or chief officer of police of the county, city, borough, or place in which the court of the revising barrister is held, to take care that a sufficient number of police are in attendance upon the said court to preserve order and execute the orders of the revising barrister.

“13. On any charge of treating, bribery, or undue influence before such revising barrister, it shall not be necessary, unless the said court shall otherwise decide, to prove agency in the first instance before giving in evidence the fact whereby the charge of treating is to be sustained.

“14. The said court shall have full power to award all reasonable costs and expenses to any person who shall, in the judgment of the said court, appear to have been unnecessarily summoned to attend the said court, and also to declare that any proceedings before the said court on the part of any person prosecuting or opposing the same have been frivolous or vexatious, and to assess the amount of the expenses which have been thereby incurred, but no such application for costs or expenses shall be entertained until after the result of the poll shall be declared.

“15. At a time or place to be fixed, when the result of the poll shall be determined, the said court shall meet for the purpose of

inquiry into, and examining and allowing the expenses of, the said election—and no bills, charges, or claims upon any candidate, for or in respect of such election shall be paid.

“16. The detailed statement of election expenses mentioned in ‘The Corrupt Practices Prevention Acts,’ with the bills and vouchers relative thereto, shall, on the receipt thereof by the returning officer, be given to the revising barrister, who shall hold a court at a time and place to be fixed by him, and there and then examine into the said expenses; and for that purpose shall have the same powers with respect to calling persons and documents before him, as is provided by s. 12 of this Act, and he shall disallow all such expenses as have been illegally incurred, and no payment of any part of such expenses shall be valid until the same shall have been allowed by the said court.

“17. The agents of election expenses named in the 2nd section of ‘The Corrupt Practices Prevention Acts,’ shall, in England or Ireland, be an attorney of one of Her Majesty’s superior courts of common law, and in Scotland a writer to the signet, or solicitor of one of the superior courts, and shall attend the court of the revising barrister during the whole time whilst the statements of expenses are being examined, and if the said agent shall wilfully make or allow any advance, loan, or deposit, which is not included in the said statement of expenses, or which has been so made or allowed for the purpose of bribery, treating, or undue influence, he shall be guilty of a misdemeanour, and further, shall be deemed to have been guilty of gross misconduct in his profession of an attorney, solicitor, or writer to the signet, and be punished accordingly by the judges of any court of which he is an officer on a summary application to such court, and it shall be the duty of the revising barrister, if such misconduct shall be proved before him, to certify the same under his hand and seal to any such last-mentioned court.

“18. In addition to the allowance provided for revising barristers in England and Wales by the 6 Vict., c. 18, the revising barristers shall be allowed the sum of ten guineas a day for each day that they shall be occupied in discharging any of the several duties imposed upon them by this Act, to be paid to the said revising barrister out of the Consolidated Fund on the particulars thereof being certified to the treasury under the hand of the revising barrister.

"19. Throughout this Act, in the construction thereof, except there be something in the subject or context repugnant to such construction, the word county shall extend to and mean any county, riding, parts, or division of a county, stewarty, or combined counties returning a member or members to serve in Parliament; and the words city or borough shall mean any university city, borough town, corporate county of a city, county of a town, cinque port, district of burghs, or other place or combination of places (not being a county as hereinbefore defined) returning a member or members to serve in Parliament, and the words returning officer shall apply to any person or persons to whom, by virtue of his or their office under any law, custom, or statute, the execution of any writ or precept doth, or shall, belong for the election of a member or members to serve in Parliament, by whatever name or title such person or persons may be called.

The object of the first two clauses is to purge the electoral body of all persons in any way belonging to the criminal class.

The French law provides, as the consequence of a conviction of crime, privation of civil rights for a fixed period. If all persons in this country already tainted with crime or corruption were to be deprived, in the mode proposed, as well of the elective franchise as of the capacity to hold any office of trust, the status of both electors and elected would be greatly improved; and municipal and parochial offices, and the much under-valued office of "juryman," would be held in more esteem by those whose services our constitution requires for the due administration of justice. The object of the third section is to prevent the discreditable practices with respect to actions and threats of actions for penalties for bribery, and more effectually to bring home the punishment to offenders by giving a summary and expeditious remedy before a justice of the peace.

The suggestions for extending the advantages of the registration system, and the utility of the revising barristers' courts are carried out by the fourth and fifth clauses, which transfer

to those courts the revision of the lists of voters at municipal elections and the jury lists. The incessant outcry against the present abuses and irregularities in our jury system suffice to recommend a change which would be one step, at least, in a proposed very salutary reform in the laws affecting juries and jurymen.*

The provisions of the seventh section will, if the Bill become law, go far to put an end to much of the trickery practised at elections, and of the iniquities of election committees. If, as pointed out in our last number, the irregularities which occur at elections were to be looked to at once and on the spot, the corrupt class would be more effectually put to confusion than by all the pompous machinery now devised for reviewing the proceedings at elections. To the clauses in the present Bill having this object in view, we especially invite attention.

Another feature in the Bill, the revision of the expenditure of elections, also deserves attention. All plans hitherto suggested have so far failed that the expenses last year were, in many cases, greater than ever. The simple machinery provided by the present Bill, of requiring a system of taxation and allowance on the expenses, would effectually stop much corrupt expenditure, and the provision that, in every case, the election agent should be an attorney of the superior courts, would ensure the employment of men responsible to the courts for their good conduct.

We now take leave of the subject for the present, with the parting remark that the reform proposed is at once economical, as well as simple.

* "Proposal for Amending the Law affecting Juries and Jurymen," by Mr. Serjeant Pulling, read before the Law Amendment Society. 1864.

ART. VIII.—THE ENGLISH AND IRISH LAW AND CHANCERY COMMISSION.

THE second and final Report of the English and Irish Law and Chancery Commission has just been issued. It bears the signatures of Lord Justice Blackburn, who has been appointed Lord Chancellor of Ireland by the present Government; the Lord Chief Justice of the Common Pleas in Ireland; the Right Hon. Abraham Benoctu; Vice-Chancellor Page Wood; Mr. Justice Willes; Mr. Baron Hughes; Sir Roundell Palmer; Mr. Justice O'Hagan; the Right Hon. J. A. Lawson, M.P. (late Attorney-General for Ireland); Sir Hugh Cairns, Attorney-General; George M. Giffard, Esq., Q.C.; Robert B. Follett, Esq.; and Richard J. T. Orpen, Esq. The names of three of the Commissioners are absent from this list; that of Lord Romilly, who was Chairman of the Commission, was obliged, in December, 1863, to resign in consequence of the pressure of other business; that of Sir W. Atherton, who died in January, 1864; and that of the Right Hon. Joseph Napier, who objected to sign, and intimated his intention of drawing up a separate report.

This Commission was appointed three years ago—

“To make diligent and full inquiry into, and report upon, the following matters, with a view to reduce costs to suitors, and the expenditure of the public money, and to assimilate, as far as may be practicable, the administration of justice in England and Ireland.

“1. The constitution, establishment, practice, procedure, and fees of the superior courts of common law in Ireland.

“2. The difference between the constitution and the forms of practice, procedure, and fees of the Court of Chancery of England and Ireland.”

In their first report, the Commissioners gave an account of their inquiries into the following points, and suggested the

adoption of various measures which, in their opinion, would best carry out the objects for which the inquiry was ordered :— the diversity of practice and procedure in the superior courts of common law in England and Ireland, especially with regard to the several Common Law Procedure Acts in each country ; the diversity in the practice and procedure of the courts of Chancery in England and Ireland ; the constitution and fees of the Court of Chancery in Ireland ; the practice of the Crown side of the Queen's Bench in Ireland ; the accounts of unclaimed dividends in the Court of Chancery in Ireland ; the appointment of Commissioners to take affidavits in Ireland ; the arrangements for taking acknowledgments of married women, and the substitution of stamps for fees in the Court of Chancery in Ireland, and in the superior courts of common law in England.

The first branch of inquiry included in the present report relates as much to England as to Ireland. It is the subject of costs in the superior courts of common law in England and Ireland.

The English Law Commissioners, in their third report, in 1860, state that—

“The statutes which give to the parties a right of costs are in a very confused and unsatisfactory state ; not only because the separate enactments of the older statutes give rise to a variety of decisions, but because subsequent statutes have, in some instances, modified, and, in others, partially repealed, former enactments, so that it is extremely difficult to ascertain what the real state of the law is on this subject.”

And they express an opinion that these statutes should be revised and consolidated ; but no steps have since been taken to carry out the revision and consolidation which they recommended.

The present Commissioners report that they have found that the law of costs in the superior courts of common law in Ireland is, also, “in a confused and unsatisfactory position.”

And, with a view of having the statutes relating to the point in England and Ireland revised and assimilated, they obtained from Mr. Jellett, Q.C., of the Irish Bar, and Mr. Holland, of the English Bar, very able statements upon the subject, and a final statement of the differences of the law in force in the two countries. The principal recommendation of the Commissioners on this point is, that there should be a complete assimilation of the law in England and Ireland, and a consequent revision and consolidation of the statutes.

With regard to final costs, the Commissioners make an important proposition, which, if accepted, will remove the complication and difficulty which exists at present, viz. :—

“That the successful party, whether plaintiff or defendant, and whether he succeed by verdict or by judgment in demurrer or in judgment by default, should (save in the cases next hereinafter excepted) be entitled to costs as of course.

“*Exceptions.*—That when the plaintiff recovers in any way a sum less than £20 in an action of contract, or than £5 in any action of tort, except replevin, he should not be entitled to costs without the certificate of the judge, presiding officer, or court in his favour.”

Upon the subject of fees, taxes, and compensation, and fee fund and suitors fee fund in the Court of Chancery in Ireland, the Commissioners report that the taxation levied on proceedings in the Court of Chancery in Ireland is accounted for in several different ways.

“The taxes in the masters’ offices are chiefly levied by stamps called chancery fund duties, whilst in the same offices fees are received which are accounted for to the suitors’ fee fund.

“In the Rolls’ Office some of the fees are received by the officers for their own benefit, and others are, under stat. 4 Geo. IV. c. 61. accounted for to the consolidated fund.

“The fees to which the Lord Chancellor himself is entitled are accounted for to the chief secretary’s office, and paid into Her

Majesty's treasury, so that there are five different methods of accounting for the fees and taxes received.

"In the payment of the officers' salaries and expenses different methods are pursued ; some officers are paid by the paymaster of the Civil Service, some by the accountant-general out of the suitors' fee fund, some by the heads of the departments by way of deduction from the fees before they reach the suitors' fee fund, and some are paid partly by the accountant-general, and partly by fees for their own benefit, and others are paid entirely by fees for their own benefit."

The Commissioners are of opinion that a uniform system of taxing chancery proceedings in Ireland and expending public money should be adopted in all the offices of the court ; that all taxes or fees or payments in the nature of taxes on proceedings in the Court of Chancery in Ireland should be levied by stamps, and carried to one account, and that the fund so created should be considered the primary fund for the payment of the salaries of all the officers of the Court of Chancery in Ireland holding other than judicial offices.

They also observe that—

"The suitors' fee fund of the Court of Chancery in Ireland is at present complicated by being connected with two other accounts, the interest and produce of the compensation and fee fund of the Court of Exchequer in Ireland, and the interest and produce of the compensation and fee fund of the Court of Chancery in Ireland.

"The suitors' fee fund has been for some years insufficient to meet the charges upon it, and the deficiency is charged to the consolidated fund. It appears, however, that the Exchequer compensations, instead of being paid directly from the consolidated fund, are paid out of the suitors' fee fund, this increase making the deficiency of the fund appear so much larger.

"As the jurisdiction as to sales in the Incumbered Estates Court has been made perpetual in the Landed Estates Court, the causes which have effected a decrease in the chancery fees since 1850 are likely to be permanent, and the compensation fund and fees are

not likely to be more than sufficient to provide for the officers of the court."

The Commissioners are of opinion that all the Exchequer compensations above the total amount of £800 a year, should be paid directly out of the consolidated fund, and that all charges in favour of the consolidated fund against each of the chancery funds on account of past equity exchequer compensation should be remitted; and they recommend that "as soon as the last of the equity exchequer compensation shall cease, the exchequer compensation and fee fund should be amalgamated with the chancery compensation and fee fund.

The Commissioners further report that—

"The chancery compensation and fee fund in Ireland has never been as large in proportion to the staff of the court as the chancery compensation and fee fund in England. The unemployed cash of the suitors of the Court of Chancery in Ireland was diminished from an early period by grants for the building of the first courts in Dublin, at different times—commencing so far back as 1790, on the same principle as the fund of the suitors of the Court of Chancery in England are to be applied to the building of the courts of justice in London under the Act of last session."

And they recommend that—

"For the future all payments for compensation or superannuation should be paid primarily out of the produce of the compensation and fee fund of the Court of Chancery, and that the deficiency of that fund, if any, should be paid directly out of the consolidated fund; and that the fund produced by the entire taxation on the proceedings of the court should be directly applied to the payment of the entire staff (except judicial officers) and the surplus carried to the consolidated fund."

There are also important changes recommended in the report with reference to the Crown side of the Queen's Bench in Ireland. The various reforms which have taken place in

England have not been extended to Ireland, and the expenses attendant on law business in that court have continued excessive—the court fees being in nearly every instance more than double those charged in England. In a writ of mandamus in England the fee is only 5*s.*, whereas in Ireland it amounts to 12*s.* 6*d.*, and all the fees are upon the same scale. There is, moreover, a singular difference between the fee imposed on taxation of costs on the Crown side, and the corresponding duty on the Civil side of the court. For instance, the duty on the Civil side, payable upon costs ranging from £5 to £20, is only 2*s.*; while, on the Crown side, the fee imposed on costs of the same amount, is 5*s.*

The Commissioners suggest that the Irish Court of Queen's Bench should be invested with powers similar to those possessed by the English court, and that the proceedings and practice of the Crown side of the court in England should be adopted in Ireland; and they recommend the following changes, which they say if effected will be calculated to increased the number of applications to the court; so that a lower scale of stamp duties would be as profitable to the Exchequer as the High Court fees at present imposed.

“1. That the English practice of having books for the judges in law arguments on the Crown side prepared by the parties, should be adopted in Ireland.

“2. That stamps should be substituted for court fees on the Crown side of the Court of Queen's Bench in Ireland ”

The Commissioners, in reporting upon the official establishment on the Crown side of the Court of Queen's Bench, Ireland, state that it is, in their opinion, an objectionable arrangement to have the chief clerk's pay derived, as at present, from three sources—partly from the consolidated fund—partly from his superior officer—and partly from fees. They recommend that his salary should be paid out of the consolidated fund, and that he should not be obliged to pay out of his salary either the chief or junior clerk; the salaries of these officers

should be fixed at a certain amount, and paid by annual vote of Parliament.

Upon the subject of the practice and procedure as to the law of judgment in Ireland, the Commissioners report as follows :—

“We found the law of judgments of the superior courts of common law in Ireland, and the practice, process, and procedure thereon, to be in a very complicated and unsatisfactory state, and to differ in some material respects from the law of England on that subject.

“With a view to the amendment of the law of judgments in Ireland, and its assimilation, as far as practicable, to the law of England, we employed Mr. James H. Monahan, of the Irish bar, to prepare a statement of the law of judgments in Ireland, with such suggestions for the simplification and improvement thereof as might occur to him.

“His statement was made to us previously to the passing of the Act of 1864, 27 & 28 Vict. c. 112, which has effected extensive changes in the law of judgments in England, as well as previously to the passing of the ‘Record of Title (Ireland) Act, 1865’ (28 & 29 Vict. c. 88), which has effected changes in the law of judgments in Ireland, but we have taken the provisions of those statutes also into consideration.

“The difference between the law of judgments in Ireland and in England relates almost entirely to the effect of judgments upon the estate of the judgment debtor in land, and has arisen from the different way in which judgments have, for upwards of a century and a half, been dealt with in the two countries, in consequence of the difference in the laws with regard to land.

“The principal existing difference in the law with regard to land arises from the general registry of deeds, which has existed in Ireland since the year 1707, whilst there are registers in only a small part of England—Yorkshire, Middlesex and Bedford Level.

“The provisions of the Irish Act for registration of deeds, 6 Anne (Irish), c. 2, has rendered the ownership of the legal estate and the possession of title-deeds by a mortgagee or incumbrancer, which

is of so great importance in England, comparatively immaterial in Ireland.

“Shortly prior to the establishment of the general registry of deeds in Ireland, another Act, respecting property in land in Ireland, came into operation, which had a very great effect in encouraging judgments as securities on land, and in discouraging mortgages. This Act was stat. 2 Anne, c. 6 (Irish), passed in 1703.

“By this Act (s. 6) Roman Catholics were made incapable of purchasing land (except leaseholds not exceeding thirty-one years, at a rent of not less than two-thirds of the value), or of having land (except as aforesaid) purchased upon any trust or confidence for their use and benefit.

“By the 10th section, lands of which Roman Catholics in Ireland were or should be seized were made subject to the law of gavelkind, unless the eldest son was a Protestant ; and by the 14th section, all debts and incumbrances on the real estate of any Roman Catholic were required to be enrolled within six months in the Court of Exchequer, and in default of such enrolment such debts and incumbrances were declared not to charge the lands of any Roman Catholic when and during such time as they should belong to a Protestant.

“Upon the construction of this Act it was held that judgments obtained by Roman Catholics, or for the benefit of Roman Catholics, were not within the meaning of the Act, and that the Act, so far as it required the enrolment of debts and incumbrances affecting real estates, did not apply to judgments of the superior courts. It was also held that a Roman Catholic might confess a judgment to another Roman Catholic, even though such judgment might be without any consideration.

“The effect of this statute was very considerable, for Roman Catholics then, as now, formed a large proportion of the population of Ireland, and the statute gave to judgments, as securities, for money lent by or to Roman Catholics, advantages over deeds affecting real estates. It also gave a peculiar effect to judgments as securities for the settlements of the property of Roman Catholic proprietors of land. Devices were adopted by such proprietors by which their estates were affected by judgments of greater value than the estates themselves ; and these judgments, being held by

Roman Catholics, or by trustees for them, rendered such estates of no value to Protestants claiming them under the penal laws against Roman Catholics.

“That the use of judgments, as a security for money, became very prevalent in Ireland, appears from the recital of the Act passed in 1735, which made certain judgments legally assignable in Ireland (stat. 9 Geo. II. c. 5) (Irish), in which it is stated that ‘judgments, statutes staple, and statutes merchant, are frequently assigned for valuable considerations, and to protect the purchase of estates.’

“The Act of 9 Geo. II., for making judgments assignable, was temporary in the first instance. It was, however, amended by stat. 25 Geo. II. c. 14 (Irish) in 1751, was revived after it expired in 1769-70, and was made perpetual in 1771-72 by stat. 11 & 12. Geo. III. c. 19 (Irish).

“Towards the close of the eighteenth century, by the successive Emancipation Acts of 1782 and 1793—stats. 21 & 22 Geo. III. c. 24 (Irish) and 33 Geo. III. c. 21 (Irish)—the disabilities of Roman Catholics, so far as regarded the holding of land and suing on elegits, were removed.

“The law and practice as to judgments in Ireland continued undisturbed until 1835, when, by stat. 5 & 6 Will. IV. c. 55, proceedings by writs of *custodiam* (except for debts due to the Crown) were abolished, and the appointment of receivers by the courts of equity on a summary petition was introduced.

“Besides its direct effect in abolishing writs of *custodiam*, the statute had the indirect effect of leading to the disuse of writs of *elegit*, as the appointment of a receiver was a much more satisfactory and effectual remedy for the creditor than an *elegit*; and when, in 1840, the powers of the courts of equity in appointing receivers were still further extended by stat. 3 & 4 Vict. c. 105, the use of *elegits* upon judgments became almost obsolete.

“In 1849 the Incumbered Estates Court was established by stat. 12 & 13 Vict. c. 77, and the commissioners were enabled to sell lands discharged of incumbrances with a parliamentary title. This court was converted into a perpetual court in 1858, under the title of ‘The Landed Estates Court.’”

After the passing of this Act it became the policy of the

legislature to restrict the remedy of appointing receivers, by which large quantities of property had been placed under the management of the Courts of Chancery and Exchequer, and accordingly, in 1849, an Act was framed (12 & 13 Vict. c. 95) which provided that—

“No revision should be appointed in foot of any judgment entered after August 1, 1849 (except in judgment entered before December 31, 1849, on power of attorney executed before August 1, 1849), unless the sum due for principal and interest, exclusive of costs and all just and fair allowances, exceeded £150.

“In England, where a Landed Estates Court has not been established, the writ of *elegit* is still in use, but stat. 23 & 24 Vict. c. 38., the operation of which is confined to England, requires the registration of the writ of execution in order to bind purchasers, and the statute of 1864 (27 & 28 Vict. c. 112), also confined to England, requires land to be actually delivered in execution under the writ before the judgment can affect the land as against purchasers.

“The Act of 1864 (stat. 27 & 28 Vict. c. 112) has effected a change in the law of judgments in England, which creates a further important difference between the laws on the subject in the two countries.

“This statute in effect puts an end to future judgments being permanent charges on land in England, as it is provided that no judgment shall affect any land until such land shall have been actually delivered in execution.

“The class of judgments at present in force in Ireland which involve the largest amount of money are judgments registered before 1849, and re-registered every five years since. They are, as the law now stands, equitable charges on land requiring to be re-registered every five years, and are legally assignable. The next largest class consist of judgment mortgages under the Act of 1850. They are legal mortgages, and do not require to be re-registered, and are legally assignable as mortgages. Besides these leading classes, there are judgments since 1850 registered as judgments, but not as judgment mortgages; judgments entered up between the 1st of August 1849, and the 15th of July 1850, and above £150, and

judgments entered up between the same dates and below that amount."

Judgment mortgages were created by the Act of 1850 (stat. 13 & 14 Vict. c. 29) and in the same session the regulation of deeds (Ireland) Act (13 & 14 Vict. c. 72) for the regulation of assurances of lands in Ireland by means of the ordnance maps and land indexes. The regulation was to commence when the indexes were completed, but as they have not been made, the Act has not come into operation.

"In the last session of Parliament a further change was made in the law of judgments in Ireland, and a third system of registration of judgments was established by the 'Record of Title Act (Ireland), 1865,' (stat. 28 & 29 Vict. c. 88). By the 42nd section of this Act it is enacted that no judgment shall be a charge upon land recorded under the Act, unless and until a memorandum of the same, in such form and with such verification or other evidence as the Landed Estates Court, Ireland, may by general rule direct, shall be lodged with the officer, for the time being, of that Court, and that it shall not be necessary to register or file any affidavit in the registry of deeds office for the purpose of making a judgment a charge on recorded land. And by the 43rd section of the same Act it is enacted that judgments entered on the Record (*i.e.*, on the books to be kept for the recording of titles pursuant to the Act in the Landed Estates Court) by the lodgment of a verified memorandum, and the entry of an official note as therein mentioned, shall be re-entered before the end of every five years from the entry thereof by the like means; and that no judgment shall be of any force or effect as against a purchaser for valuable consideration or mortgagee of a recorded estate, unless the same shall have been entered or re-entered on the record within five years previous to the date of the recording of his purchase or mortgage; and that no such purchaser or mortgagee shall be affected by notice, express or implied, of any judgment."

The commission concludes this branch of their report by stating:—

“As the result of our inquiries on the law of judgments, it appears that while in England the tendency of the whole course of legislation down to and inclusive of the Act of 1864 (27 & 28 Vict. c. 12), has been to reduce a judgment to a step in the course of procedure for the recovery of a debt, insomuch that by the last-mentioned Act it is provided that ‘no judgment to be entered up after the passing of the Act shall affect any land, of whatever tenure, until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority;’ in Ireland, on the other hand, the legislation down to and inclusive of the ‘Record of Title Act, 1865,’ has been in the opposite direction, and judgments affect land in Ireland prior to and entirely independent of execution, and the writ of *elegit* has there been virtually abolished.

“The extent to which this difference in the course of legislation has affected the position of judgments in the two countries appears from a return showing that in Ireland no less than 11,611 judgments, estimated to be securities for upwards of £12,000,000, have been re-registered within the five years ending the 31st of December 1864, and so far appear not to have been immediately executed; whilst in England and Wales the number of judgments re-registered in the five years ending 1863 was only 1,778. Again, under the Judgment Mortgage Act, 12,000 statutable mortgages of land in Ireland, estimated to be securities for £4,000,000, have been created by the registration of affidavits as to judgments under that Act.

“The difference between the laws of the two countries as regards judgments is not one of mere practice and procedure, but extends to the law of bankruptcy, the jurisdiction of the Landed Estates Court, the registry of deeds, the law of debtor and creditor, and, generally, to the law of property in land; and we found, as our inquiry proceeded, that the question of the simplification and amendment of the law of judgments in Ireland was one which could not be satisfactorily dealt with by any modification of practice and procedure alone, but required to be considered as a whole, and in connection with the several branches of law to which we have referred, and could only be satisfactorily disposed of by a parliamentary committee or by a commission specially constituted for the purpose, and with full powers to enter upon all the inquiries necessary for its solution.”

Upon the subject of the registration of judgments, the Commissioners report—

“That the present system of recording judgment, recognizances, &c., creates great complication and delay in searching; a search against a single name for judgments and other charges involving the examination of at least sixteen books, which necessitate, on an average, a delay of ten days from the time that a search is bespoke till it is given out of the office.”

The plan proposed for the future, in order to avoid this, is to have—

“The books in the office for the registry of judgments kept like a ledger, and in the same manner as the books in the Accountant-General’s office, all the acts relating to each distinct name being entered in the same page or part of a page. By this plan a search could be made in a few minutes, and a copy of the entries affecting each name given the same day as the search was bespoke.

“The adoption of this plan would do away altogether with the delay and labour of copying the negative searches into parchment books, under the provisions of stat. 11 & 12 Vict., c. 120, s. 1.”

With reference to the official establishment of the Court of Chancery in Ireland, the Commissioners have obtained returns as to salaries, duties, and appointment of officers in England, and similar returns from Ireland, and they obtained from Messrs. Barber and Jellett a statement as to the differences existing between the official establishments of the Courts of Chancery in England and Ireland, as distinguished from the judicial establishments.

In reference to the office of clerk of records and writs, Messrs. Barber and Jellett observe—

“The duties performed by the clerks of records and writs in England correspond in part with those performed by the deputy-keeper of the rolls and the clerk of enrolments, in part with those discharged by the clerk and assistant clerk of the pleadings in the office of the deputy-keeper of the rolls, in part with those discharged by the clerk of appearances and writs, and in part with

those discharged by the clerk of affidavits. In Ireland there is no office which corresponds, either in title or character, with the office of Clerk of Records and Writs."

So that it appears this office in England does the business of five distinct departments in Ireland.

The Commissioners accordingly recommend with regard to this point—

"1. That the following offices in the Courts of Chancery in Ireland should be consolidated under the title of 'The Record and Writ Office'—

"1st. The Affidavit Office.

"2nd. The Office of Writs and Appearances and Notices.

"3rd. The Recognizance Office.

"4th. The Department of the Deputy-Keeper of the Rolls, the duties of which are discharged by the Clerk and Assistant-Clerk of the Pleadings.

"5th. The Department of the Registrar's Office, the duties of which in respect of reports and accounts are discharged by the Clerk of Records and his Assistant.

"2. That all pleadings, affidavits, recognizances, reports, and accounts, not ten years old, should be transferred to and deposited in the record and writ office, and when ten years old should be removed therefrom, and deposited in the office of the deputy-keeper of the rolls.

The Commissioners express themselves as follows as to the superannuation of the officers of the Court of Chancery in Ireland—

"The superannuation of officers of the Court of Chancery in Ireland is regulated by the Irish Chancery Regulation Act of 1850. By that Act a rule of superannuation was adopted similar to the rule for officers of the Court of Chancery in England, of allowing superannuation at the expiration of twenty years. Since that Act was passed, the suitors' fee fund of the Court of Chancery of Ireland has not been sufficient to bear the charges upon it, and owing to the great change in the amount of business, caused by the establishment

of the Landed Estates Court, that fund is not likely to be at all as relatively productive as the corresponding fund in England. The rule of superannuation established for the officers of the Court of Chancery in Ireland is more favourable than that provided for clerks of the court by the same statute, it is also more favourable than the rule provided for officers of the superior courts of common law in England—these two classes of officers and clerks having been by statute placed on the ordinary scale of officers and clerks of the Civil Service entitled to superannuation. We have already recommended that the officers of the superior courts of common law in Ireland, who laboured under a disadvantage by being omitted from the provisions of the General Superannuation Act of 1859, should obtain the benefit of that Act, and be placed in the same position with regard to superannuation as the officers of the superior courts of common law in England. And we think that the same principle of uniformity of rule as to superannuation should be applied to the Court of Chancery in Ireland, and that the privilege of retiring at the end of twenty years should, as to future officers, be abolished, and that instead thereof the rules of the General Superannuation Act of 1859 should be substituted.”

The Commissioners propose the following changes in official establishments of the superior courts of common law :—

“It appears from the evidence before us that a considerable reduction can be effected in the number of masters and principal assistants, and that one master, with a principal assistant and clerk, could efficiently discharge the duty now performed by the three masters, and their assistants and clerks. A consolidation of the three masters’ offices into one for the three courts would be in accordance with the precedent already established with regard to the taxation of costs, the issue of writs, and the registration of judgments, there being only one taxing office, one writ office, and one office for the registration of judgments for the three courts ; and, as has been found in the case of the taxation of costs, the consolidation would also lead to a valuable result by producing uniformity of practice in the business devolving on the masters. This change would throw on the single master retained increased duties, for which we think he ought to receive an increase of salary.

"The number of masters being reduced from one for each court to one for the three courts, the officers, now called clerks of the rules, would become the principal officers of each court. In Ireland the masters have not heretofore sat in court, and the court duties similar to those discharged by the masters in England have been, and are to be, performed by the clerks of the rules, who also attend the judges sitting in chambers. We therefore recommend that the clerks of the rules in Ireland should for the future be called 'registrars,' and, in consideration of their increased duties and responsibilities, should receive an increase of salary.

"It appears from the evidence before us that it would be desirable to have a separate officer for the registration of acknowledgments of deeds by married women in the Common Pleas; at the same time the number of acknowledgments to be registered would allow the officer time to discharge some other duties. The registration of bills of sale, now confided to the master of the Queen's Bench, might be advantageously taken from the Queen's Bench, and attached to the Common Pleas, and the two duties would afford sufficient employment for a separate officer.

"The whole annual saving arising from the adoption of all the changes we recommend in the Common Law Offices would be as follows:—

	£	£
"Reduction of two Masters, two Principal Assistants, and two Masters' Clerks	-	4,200
"Reduction of three Assistants, Revenue Assistant, and seven Clerks	- - -	2,725
		6,925
"Deduct consequent increase of salary to single Master and three Registrars	- -	800
"Registrar of Acknowledgements of Deeds by Married Women and Bills of Sale	- -	300
		1,100
Net Saving	- - - - -	£5,825

The Irish Chancery Bill and Common Law Bill introduced by the late Government was founded upon the first report of the Commissioners. The first of these Bills was read a second

time with the concurrence of Sir Hugh Cairns, and, as he took an active part in the inquiry and signed the second report, it may be expected to form the basis of legislation, under his auspices as attorney-general in the ensuing session of Parliament. The whole scope of the recommendation of the Commissioners proposing to extend to the Irish courts the benefit of the modern reform in legal procedure, and in the constitution of the offices of the second courts in England, seems calculated to promote a thorough assimilation of the laws in two important portions of the empire, and to establish, in the very extensive class of interests comprised in the subjects of inquiry, a more thorough union between England and Ireland.

ART. IX.—EXTINCT PEERAGES.

A Genealogical History of the Dormant, Abeyant, Forfeited, and Extinct Peerages of the British Empire. A New Edition. By Sir BERNARD BURKE, LL.D., Ulster King of Arms. Harrison, Pall Mall, 1866.

SIR Bernard Burke's very popular works, though belonging to the heraldic class, have their legal side also; none more so than this book, which, if searchingly perused by those learned in, or even amateurs of the law, will unfold many a curious case—many a claim to honours or estate which, though long since forgotten, might raise up in a moment a host of competitors. The dormant and abeyant peerages recorded are far more numerous than we thought; and their very quantity makes us rejoice that the House of Lords must intervene before any of them can be properly assumed or borne. Unlike the open helmets of baronetcies, in their present anomalous condition, the coronets of dormant and abeyant peerages cannot be clapped on the heads of mere

pretenders. The sovereign and the House of Lords have to be first satisfied; and in most instances, before the claimant can be ennobled, that very learned and interesting piece of litigation must ensue, known as a peerage case. Interesting indeed, though too much slighted by the public, peerage cases contain in their details more of romance, and of wonderful adventure, than any other kind of judicial investigation. The criminal courts, it is true, have their never-ending marvels, but they mostly deal with the lower class of men, and with facts humiliating and degrading. The sensation of a criminal trial comes often from the slums of humanity, so much so, that some urge, though wrongly, against the publication of their revelations. The Rev. Mr. Spurgeon, in one of his sermons, dilates eloquently against the reports of criminal trials being circulated. We cannot agree with him, but as to the objections he starts, peerage cases are usually free from them. A peerage case generally soars into a higher atmosphere, and with the same wand that is of such magic power in the hands of the able historical novelist, it brings nobles and princes, warriors and statesmen, bishops and judges, priests, politicians, and lawyers, all back upon the scene, far more forcibly and visibly, too, than can a Scott mingling history with fiction. Upon the deeds and records and writings, the words of the dead are produced in evidence from their chests and archives at the bar of a genealogical tribunal; the very men who wrote or were connected with them seem to burst their cerements and to be cast up again. In the Shrewsbury case, for instance, all who were present will remember the sudden awe that pervaded the House when was unfolded the mouldy enrolment of the patent which gave the earldom of Shrewsbury, more than four hundred years ago, to that valiant Talbot who beat the French in forty engagements, and whom Shakespeare called "the great Alcides of the field." Imagination might almost, at the moment, have traced the steel-clad hero about once more to take his seat among his peers. Again, the production of the register of St. Anne's, Soho, startled the audience, when it brought back

a Talbot, who, in that parish, had passed away in poverty and oblivion, but who possibly might have left issue, whose representative, were he now to be found, would be senior earl of England. That Shrewsbury case, in all its bearings, was most marvellous and most mysterious. Such kind of peerage investigations are not, however, very frequent. Their rarity may in some measure be supplied by the book before us, replete as it is with lordly pedigrees, and lordly rises and falls. It affords not only salient memoirs, but it goes into all the curious *minutiae* that hang around the family histories of some of the greatest men the world ever saw. An illustrious host of by-gone nobles in all their chivalry pass before us, each with his own attribute of excellence, whether in the Church or the Parliament or the State; whether in arms or law.

To all connected with jurisprudence there is much to call for their attention in this work, whether it be as to the history of some of the greatest men of their profession, or whether as to the points and precedents of the law of pedigree which continually occur. Among the law points, we may cite the Willoughby of Parkham question; the Banbury case (by the way, General Knollys, Comptroller of the Household of H.R.H. the Prince of Wales, is the present representative of that claim); the strange decision as to the office of Great Chamberlain in the De Vere family; the celebrated Purbeck case; the Montrose claim, &c.

As to great lawyers, to the honour of the profession, the book abounds with them, whether as founding families themselves, or adding increased lustre to the high families to which they already belonged. First of all, we lawyers should know that "the blood of all the Howards," flows from a purely legal source, as the following extract will show—

"The first of this very eminent family (the Howards) mentioned by Dugdale, after a fruitless inquiry to discover a more ancient founder, was—

"Sir William Howard, Lord Chief Justice of the Court of Com-

mon Pleas from 1297 to 1308. This learned person had large possessions in Wigenhale, in the north-west parts of the county of Norfolk ; and he had summons in the 23 Edward I., amongst the rest of the judges, and the king's learned council, to the parliament then held at Westminster, as also to those parliaments of 25, 28, and 32 of Edward I., and 1 Edward II."

The following is the statement of the modest origin of the great Lord Somers, and of how the family he magnified is preserved in the line of the present Earl Somers :—

"JOHN SOMERS, or SOMMERS, gent., of Clifton-on-Severn, an attorney in the city of Worcester ; *m.*, in 1848, Catherine, youngest dau. of John Severne, Esq., of Powyck, co. Worcester (ancestor of the Severnes of Wallop Hall, co. Salop) ; and by her (who *d.* in 1709) left at his decease, January, 1680-81, one son and two daus., viz.—

"I. JOHN, LORD SOMERS.

"I. Mary, *m.* Charles Cocks, Esq., M.P., and had issue.

"II. Elizabeth, *m.* Sir Joseph Jekyll, Master of the Rolls ; and *d. s. p.* 1745. The son and heir—

"JOHN SOMERS, *b.* at Worcester, in 1652 ; having been brought up to the higher grade in the legal profession, acquired such reputation as an advocate, that he was engaged in the important case of the Seven Bishops, *temp.* JAMES II., and his speech upon that occasion will ever be regarded as one of the boldest, most impressive, and constitutional, delivered at the Bar. After the Revolution, Mr. Somers was appointed successively (1689) solicitor and (1692) attorney-general, and received the usual honour of knighthood. In 1695, he became lord keeper, and in 1697 was constituted Lord Chancellor of England, and elevated to the peerage as LORD SOMERS, BARON OF EVESHAM, co. Worcester.

"Lord Somers survived, however, his great mental powers, and *d.* in dotage, *unm.*, April, 1716, when the Barony of Somers became *extinct*, and his estates devolved upon his sisters as co-heirs, the elder of whom—

"MARY SOMERS, *m.* Charles Cocks, Esq., M.P., in 1692, for the City of Worcester, and had issue—

"I. JAMES COCKS, M.P., of Bruckmans, Herts, whose only son, James, was killed at St. Cas, on the coast of France, September 11, 1758.

"II. JOHN COCKS of Castleditch, co. Hereford, whose eldest son and successor—

"CHARLES COCKS, Esq., of Castleditch, M.P., was created a baronet in 1772, and was elevated to the peerage as LORD SOMERS, BARON OF EVESHAM, in 1784: he was great grandfather to the present Earl Somers.

"I. Katherine Cocks, *m.* to James Harris, Esq., of Salisbury.

"II. Margaret Cocks, *m.* to Philip Yorke, 1st Earl of Hardwicke, lord-chancellor."

The Yelvertons, Viscounts Longueville and Earls of Sussex, had no less than three judges of Westminster in their pedigree. First was Sir William Yelverton, K.B., a lawyer of great eminence, judge of the Court of King's Bench, *temp.* Henry VI.; his lordship seems to have stood well both with that monarch and his opponent, Edward IV. In the reign of Queen Elizabeth was the second judicial luminary, Christopher Yelverton, Queen's Serjeant, Speaker of the House of Commons, and eventually a judge of the Court of Queen's Bench. He was father of the third judge, the famous Sir Henry Yelverton. Of him Sir Bernard writes that—

"That gentleman, like his father, adopted the profession of the law, was appointed Solicitor-General in 1613, and knighted about the same period. In 1617, Sir Henry Yelverton was made Attorney-General; previously, however, he is said to have displeased the king by refusing to appear against the Earl of Somerset at his trial for the murder of Sir Thomas Overbury, and in the October of the year in which he was advanced to the attorney-generalship, we find him writing a letter to his royal master, complaining 'of his unhappiness to fall under his majesty's displeasure who had made him almost the wonder of his favour, that he conceived it to arise from some accident, befel in the late business of the marriage of Sir John Villiers, as also from a report, as if he had uttered some speeches to the dis-

honour of the Earl of Buckingham.' He pleaded his cause so successfully, however, that he very soon recovered any ground that he might have lost in James's opinion, but he was not so fortunate with the Duke of Buckingham, who seems for a long time afterwards to have regarded him with an evil eye. In 1620, principally through the machinations of that favoured nobleman, he was involved, with the Lord Mayor of London and others, in a star-chamber prosecution, regarding the passing of certain clauses in a charter to the city of London, not authorised by the king's warrant; for this offence although he made every submission, and that the charter was given up, he was adjudged to pay a fine of £4,000, to be deprived of the office of attorney-general, and to be committed to the Tower. He was subsequently prosecuted before Parliament upon another account, and the House of Lords, May 16, 1621, proceeded to sentence and declare—'That the said Sir Henry Yelverton, for his speeches uttered here in court, which do touch the king's majesty's honour, shall be fined to the king in 10,000 marks, be imprisoned during pleasure, and make submission to the king: and for those which touch the Marquis of Buckingham, he should be fined 5,000 marks, &c.' Upon which Buckingham stood up and did freely remit his portion of the fine; and the prince and the house agreed to move His Majesty to mitigate the other part of the judgment. What proportion of the fine was ultimately forgiven is nowhere mentioned, but his misfortunes soon afterwards terminated. The Duke of Buckingham visited him *incognito* in the Tower, and Sir Henry, making a sufficient apology to his grace, he was presently set at liberty, and became again a practising barrister until April, 1625, when a gentleman from the duke brought him a warrant from the king, appointing him one of the judges of the Court of Common Pleas. In this situation he remained until his decease, January 24, 1629-30, when his remains were interred in the parish church of Easton-Manduit."

Ireland also produced a judicial Yelverton, the celebrated Barry, Viscount Avonmore, Lord Chief Baron of the Irish Exchequer, but it does not appear that he was connected with the line of Yelverton, Earls of Sussex, and unfortunately his descendant has recently given a sad notoriety to the name of

Yelverton, which now-a-days somewhat mars the brilliancy of the name. Among Irish extinct peerages, that of the Chief Justice Lord Kilwarden, the victim of Emmett's mad rebellion, had a double interest, for it shows in the family, not only a great lawyer, but a great poet, whose "Burial of Sir John Moore," can never be forgotten. The pedigree, as given by Sir Bernard, is as follows :—

"RICHARD WOLFE, Esq., of Forenaghts, co. Kildare, son of John Wolfe, Esq., and his wife, Mary Cowper, *m.* Lydia Page, and had, with other issue,

"I. JOHN, of whom presently—

"II. THOMAS, of Blackhall, co. Kildare; who *m.* 1733, Margaret Lombard; and was father of—

"THEOBALD WOLFE, Esq., of Blackhall; who *m.* Frances, dau. of Rev. Peter Lombard, and had issue; Peter, James, Edward, Richard, Charles, Mary, and Margaret; the youngest son, the REV. CHARLES WOLFE, *b.* in Dublin, 14 December, 1791, was author of the exquisite elegy on the death of Sir John Moore; another of the sons was Major James Wolfe, who *m.* Elizabeth Walker, and *d.* 9 July, 1840, leaving with four daus., three sons; George, of Bishop's Land, J.P., co. Kildare; John Charles, rector of Ematris; and Charles, late British chaplain at Havre (see Burke's Landed Gentry). The elder son—

"JOHN WOLFE, Esq., of Forenaghts, *m.* Mary, dau. of William Philpotts, by his wife, a dau. of James Butler of Rathlin, and had, with other issue—

"I. PHILPOTT, of Forenaghts, *m.* Mary, dau. of Thomas Burgh, Esq., of Drumkeen, and had a son and successor, the late Colonel John Wolfe, of Forenaghts.

"II. ARTHUR, of whom we treat. The 2nd son—

"ARTHUR WOLFE, Esq., *b.* January 30, 1739, having attained considerable eminence at the Irish bar, was nominated Solicitor-General of Ireland in 1787, promoted to the Attorney-Generalship in 1789, and appointed Lord Chief Justice of the Court of Queen's Bench in 1798; when he was elevated to the peerage July 3, 1798,

as **BARON KILWARDEN** of Newlands, and advanced to the Viscounty of **KILWARDEN**, December 29, 1800. His lordship *m.* in 1769, Anne, dau. of William Buxton, Esq., of Ardee, co. Louth, M.P.; (which lady was created **BARONESS KILWARDEN**, of Kilteel, September 30, 1795, and *d.* August 23, 1804), by whom he had issue—

“**JOHN**, his heir.

“**Arthur**, colonel in the army; *d. unm.*, June 29, 1805.

“**Marianna**, *m.* to Hardwick Shute, Esq., M.D., of Gloucester, and *d.* 1814.

“**Elizabeth**, *b.* August 31, 1778; *d.* May 24, 1806.

“Lord Kilwarden, one of the brightest ornaments of the Irish bench, was murdered, while on his way to the castle of Dublin for the purpose of assisting in council, July 23, 1803, during the riot incited by Emmet; his lordship, falling accidentally into the hands of a body of insurgents, was barbarously assassinated, along with his nephew and companion, the Rev. Mr. Wolfe. His son and successor—

JOHN WOLFE, 2nd Viscount Kilwarden, *b.* 11 November, 1769, register of deeds in Ireland, *s.* to the Barony of Kilwarden of Kilteel at the death of his mother. He *d. s. p.* May 16, 1830, and with him the honours became **EXTINCT**.”

Some narratives in the volume, which touch upon the law, are curious: here is a sample:—

“**NICHOLAS DE SEGRAVE**, of Barton Segrave, co. Northampton, 2nd son of Nicholas, Lord Segrave, being in the king's service in Gascony, was summoned to Parliament as a Baron, 24 June 1295. His lordship was soon after in the wars with Scotland, and shared in the victory of Falkirk. In the 33 **EDWARD I.**, Lord Segrave, whom Matthew Paris calls ‘one of the most worthy knights in this realm,’ being accused of treason by Sir John de Cromwell, Knt., challenged, in defence of his innocence, his accuser to single combat, according to the custom of the period, but the king not giving his consent to the duel, his lordship crossed the sea, for the purpose of meeting his antagonist without the realm. Having done so, however, unlicensed, he was taken into custody upon his return, and immediately brought to trial. The affair puzzled the judges, who were at a loss to come

to a decision ; however, after three days consultation they declared that his lordship deserved death, and that all his goods should be confiscated ; yet added, that in regard he departed not from England in an affront to the king, but to avenge his own quarrel, the king should do well to pardon him. EDWARD was much displeased at the boldness of the judges, who seemed to set bounds to his prerogative, and gave them a severe reprimand. But he, nevertheless, pardoned Segrave, and restored him to his possessions ; several of the nobility having interceded for him, and entered into security for his future good conduct.

“ In the 1 EDWARD II., his lordship was constituted governor of the castle at Northampton, and marshal of England, and in four years after he obtained license to make a castle of his manor house at Barton Segrave.”

To think that a recent Act of Parliament has repealed a portion of *Magna Charta* as obsolete and useless ! The legislators who did this should read the following :—

“ RICHARD DE CLARE, 6th Earl of Hereford, appears to have been a very distinguished personage in the reign of HENRY III., and was one of the chief nobles present in Westminster Hall (40 HENRY III.) when Boniface, archbishop of Canterbury, with divers other prelates, pronounced that solemn curse, with candles lighted, against all those who should thenceforth violate *MAGNA CHARTA*. In two years afterwards an attempt was made by Walter de Scotenay, his chief counsellor, to poison the earl and his brother William, which proved effective as to the latter, while his lordship narrowly escaped with the loss of his hair and nails. In the next year the earl was commissioned, with others of the nobility, by the appointment of the king, and the whole baronage of England, to the parliament of France, to convey King HENRY III.'s resignation of Normandy, and to adjust all differences between the two crowns ; and upon the return of the mission, his lordship reported proceedings to the king in parliament. About this period he had license to fortify the isle of Portland, and to embattle it as a fortress. It is reported of this nobleman, that being at Tewkesbury, in the 45 HENRY III., a Jew, who had fallen into a jakes upon the Saturday, refusing to be pulled out in reverence to the Jewish sabbath, his lordship prohibited any help to be

afforded him on the next day, Sunday, the Christian sabbath, and thus suffered the unfortunate Israelite to perish. He died himself in the July of the next year (1262), having been poisoned at the table of Peter de Savoy, the queen's uncle, along with Baldwin, Earl of Devon, and other persons of note."

The labour expended in the production of this work must have been enormous, for we can fully understand Sir Bernard's statement that no available source of information has been neglected—no trouble or research has been spared. The result cannot be too highly lauded, for this book is of far more than passing value. We cite it as referring to lawyers, but it directs itself to all honourable British professions. It shows, with unerring example, how in every one of them the coronet of nobility is to be had, and how, though that coronet may perish, the fame of him who won it is never to be forgotten. For the younger readers of the volume, its pages furnish what the poet Southey would call a mantle of inspiration. For all, the book is a pleasing branch of that study of genealogy to which may be applied the words which Sir William Blackstone used in another sense, that it is a duty which goes hand in hand with other pursuits, that it obstructs none, and it ornaments and encourages them all.

ART. X.—ON THE REPORT OF THE CAPITAL PUNISHMENT COMMISSIONERS.

FORTUNATELY for the certainty of the law, a quality of no little importance in the administration of justice, the new Secretary of State for the Home Department does not propose to proceed this session with the Law of Capital Punishment Amendment Bill.

The Bill, as it has now come down from the House of Lords, varies as much from the recommendations of the Commis-

sioners as the opinions of the Commissioners upon the principal questions submitted to them varied from each other.

It is a subject for sincere congratulation that upon a matter so important as the alteration of the law of murder, we are not to have "compromise" legislation. •

If one considers the mode in which the law has grown and adapted itself to the exigencies of human society, it will appear no light matter to shake the foundations upon which our system of criminal jurisprudence rests.

Whether we are to adopt the theories of the late Mr. Jeremy Bentham as to "judge-made law," or whether we have faith in the enthusiastic advocates who believe in a lost code from which the common law was derived; the fact is, that the law with respect to murder is singularly precise and clear, and we entirely deny the advantage of a definition, even if it could be proved that any selected form of words could supply, which it certainly could not supply, the place of the principles of law deducible from decided cases.

At the utmost, the advantage of a definition in such a matter can be, that it supplies the memory with a verbal criterion to try the legal quality of a given act, and this can only be supposed to be useful to help the judge who expounds the law; no one gravely would contend that the criminal contemplating his crime, would look into "Russell on Crimes" or "Welsby's Archbold" for the purpose of discriminating the exact legal responsibility for the intended offence; and we do not suppose that if the law on the subject were codified or defined, the hypothetical criminal would any the more study the definition.

The advantage then we contend to be nothing, while the danger incurred by tampering with a well settled and perfectly comprehensible principle, it is difficult to overstate.

It is only necessary to bring any suggested definition to the test of our ordinary experience in life in order to feel how imperfect an instrument is human language to embody the infinite variety of human thoughts, human feelings, and

human motives, which are nevertheless the essential ingredients which give a character and colour to human actions.

Let us take Mr. Stephen's definition, which he suggests as the solution of the difficulty. "Murder," says that gentleman, "is criminal homicide committed without provocation, and either with an intention to kill, or with an intention to inflict bodily injury or violence likely to cause death, coupled with indifference whether death is caused or not."

Now apply this definition to the case, doubtless familiar to Mr. Stephen, where a man rides an unruly horse in a crowd, and death results from such a proceeding. It will be observed that in Mr. Stephen's definition, the indifference whether death is caused or not, is something different from and in addition to the intention to kill, or inflict bodily injury or violence likely to cause death; which, by the definition, is an essential element of the crime.

Yet upon Foster's principle, the mere indifference, although no specific intention was in the mind of the culprit, may be ample evidence of that malignity of heart in act which makes the offence murder.

This single instance may suffice to show that what is aimed at is not definition, but alteration; and without criticising Mr. Stephen it may suffice to say that no form of words, how deliberately chosen soever, can escape the criticism which the actual experience of life will inevitably inflict upon it.

The truth is, we have already a technical nomenclature sufficiently distinct and intelligible, because representing, with reasonable fidelity, principles which guide human actions.

If we are to define the word "murder," why not also define such phrases as "reasonable and probable cause"; or what is, perhaps, more strictly germane to the present discussion, the word "malice" itself. That word occupies no inconsiderable place both in the text books and the reports as qualifying other acts as well as acts of killing; and if murder is to be defined because Mr. Stephens can find no other synonyme for the word "malice" than "wickedness" let us test the principle by

asking whether a malicious prosecution is a wicked one. Mr. Stephen probably knows the case in which it was said that if a person institute a prosecution, his materials for it being weak and flimsy, for the *bond fide* purpose of deterring other offenders from committing depredations on private property, nevertheless his motive, though not in ordinary language wicked, is legally malicious.

Mr. Stephen charges against the criminal law, that it is "intricate and technical." He might more justly complain that our forms of procedure in both civil and criminal courts were once absurdly technical, but it is a most unfounded charge to make against the principles of the law that they are either intricate or technical.

As has been insisted upon before, where the subject-matter is complex the verbal expression of it must necessarily, if faithful, exhibit complexity, but the legislator, who is to provide for the regulation of human actions, must avoid two opposite errors.

On the one hand he must not attempt to describe with too minute particularity the circumstances of each case wherein his law is to be applicable.

On the other hand, he must not, by too wide a definition, include within his enactment cases beyond the scope and spirit of his legislation.

In proportion as any suggested definition of murder is loose, diffuse, and descriptive, or as it is narrow and rigid, will it fall into one or other of these errors.

Now imagine such a definition of murder as we find in the Swedish code—"If any one has forcibly thrust another into a place where life was placed in evident peril, and where the death of the person so exposed has resulted."

The true remedy for the imperfection of language is that which is supplied by such a system as has grown up.

Exhaustively one has ascertained that language is not sufficiently precise to represent the exact degree of moral delinquency which the common sense of mankind has adjudi-

cated to be properly punishable with death; but pervading our whole legal history may be found principles regulating the administration of justice, and the application of which to new groups of facts is perfectly easy.

We have said that the principle of the common law has been aimed at by various forms of speech in various countries, and it may be worth while to instance a few of them in order to show how feebly they represent the spirit of the common law.

Thus, in Massachusetts one kind of murder in the first degree is defined to be murder "committed with extreme atrocity and cruelty."

In Italy wilful homicide, when it has been "committed without any motive, and on the sole impulse of brutal ferocity."

In France the law distinguishes between *le meurtre* and assassination—*l'assassinat*.

Murder is not punishable with death, assassination is.

All malefactors, of whatever denomination, who in the execution of their crimes employ torture, or commit acts of barbarity, are considered assassins.

In Spain homicide is punished with death if executed with treachery. It is obvious that all these point to the heart regardless of social duty and fatally bent on mischief, which Foster gives as the true criterion.

We doubt if that criterion can be improved.

Notices of New Books.

[*.* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance require it.]

Our Commons and Open Spaces. By Henry Warwick Cole, Esq.
Q.C. London : Longmans, Green, & Co. 1866.

THE great value of land in proximity to London has been an almost irresistible temptation to lords of manors to exercise any rights that they might have over the commons, forests, and open spaces near the metropolis. The author of this interesting and able pamphlet sympathises with those who wish to preserve such places for the enjoyment of the public. He wishes to give an explanation of the law on the subject that may be likely to prove interesting and useful. The law itself is in an unsettled state, and "certain persons whose rights are of an unsubstantial character have taken advantage of its obscurity to make the most extravagant claims." Mr. Cole gives an account of the origin of manors, and thus describes some of the inconvenient conditions that were attached to the enjoyment of the estates of the lords.

"The lords were, long subsequently to the Norman Conquest, hampered in the enjoyment of their property by the rights of the Sovereign as paramount lord, on the one side, and by the rights of their own tenants as commoners on the other. Their possessions had been granted or confirmed to them upon a title not intended for their own personal benefit only, but as something to which onerous duties also attached. They were bound to render military assistance in war at their own charges, and to see to the administration of justice. They were also liable to have their possessions afforested by the king, who, down to the reign of Henry III., had the clear right to convert any wooded lands, whether belonging to his subjects or constituting his own demesnes, into forest, for no other object than for his recreation, or as it was expressed, 'for the King's princely delight and pleasure.' If any man ventured to enclose the land so afforested, he became liable to severe punishment. But Henry III., by the *Charta de Foresta* (afterwards confirmed by many succeeding monarchs, particularly Edward I.), lightened this burden, which had become oppressive, and directed that all forests made by himself of the lands of any of his subjects which were not the King's own demesne lands, should be disafforested again. The lands afforested by his predecessors were, however, left in their former condition.

Subsequent statutes, particularly the 17 Car. I. c. 16, granted further relief. But the forestal rights of the Crown still continue down to our day over the great forest of Waltham, of which Epping forms part, and over other ancient forests, except so far as in later times they have been improvidently granted away for an insufficient consideration. Even as late as the time of the Tudors, the forestal rights of the Crown were again, for a special purpose, revived or reaffirmed under the sanction of Parliament; and we read in the statute 31 Hen. VIII. c. 5, that the King having bought Hampton Court, and made it 'a most beautiful and sumptuous manor,' and adorned it with pleasure grounds, &c., assigned and limited a certain territory of ground lying and being within the precincts of East Moulsey, West Moulsey, Walton, and Esher, near and adjoining to his said manor, to be a forest; and because the king had afforested the lands of *divers other persons* to their prejudice and hindrance, he allowed them certain privileges of cutting down woods without licence, and fencing off their corn from the deer (Manwood, 61). According to the forestal laws, the ownership of all lands within their precincts continues with the subjects to whom they belong; and if there are any manors within the regard of the forest, the lord and the commoners may enjoy the herbage and profits of the land according to their respective rights, subject only to the rights of the Crown; but no one can cut down woods or coverts without the licence of the King's officers, and to do so is a waste of the forest. But grave as that offence is against the forestal laws, it is still worse to commit an '*asart*' of the forest; that is, to convert forest into arable land for tillage. To build houses or inclose ground within a forest, without licence, is another offence called a '*purpresture*,' though done on a man's own land. Such acts are in general a purpresture against the King only. But there may also be a purpresture against the King and Commonwealth; as where a house or mill is erected, within a forest, which is to the hindrance or annoyance of the common passage of the King's subjects (Manwood, 172).

"It is obvious, therefore, that wherever the Sovereign's forestal rights continue to exist, which they still do over many extensive districts in the neighbourhood of London and other large towns, they might easily be made to some extent available for enabling the public, under authority to be derived from the Crown, to go there for purposes of health and recreation, and neither the lords who are owners of the soil, nor the commoners who have rights over the surface, could prevent them. The Epping Hunt, on Easter Monday, is however the last vestige of any attempt on the part of the Crown to make its forestal rights conducive to the recreation of the public."

The homage is constituted properly of two classes, the freeholders and copyholders of the manor. The homage may consent to the enclosure of portions of the waste of the manor as against the copyholders, but there must be a custom of the manor proved by those who assert it to authorise such a course. The rights of the free-

holders of the manor do not depend upon custom, and no consent of the homage can bind them. The provisions of the statute of Merton (20 Henry III. c. 4), affect them, but this statute has no reference whatever to the copyholders of the manor. It enacted that the lord might approve or inclose as against the freeholders, if they after the inclosure had still sufficient pasture left for their tenements with free egress and regress from their tenements to the same. The onus, however, is on the lord to prove such sufficiency, and it is not enough for him to show that there is enough for the one that complains, if there is not enough for all the other commoners as well. The statute applies only to common of pasture and not to rights of turbary, estovers, &c.

"It is obvious from this explanation that the difficulty of the lord *lawfully* inclosing commons without the authority of an Inclosure Act must in all cases be great, and in most, insuperable. For this reason, approvals under the statute of Merton fell into disuse for centuries. Even if the statute could be made effectual against the freeholders, it had no application to the copyholders. Again, if the copyholders were unanimous in the lord's favour, and there was a custom authorising inclosure and the homage consented, the act could not be done if any of the freeholders had other rights of common besides that of pasture, to which alone the statute of Merton applies."

The Inclosure Acts give abundant facilities for the legitimate inclosure of waste lands. The lords of manors, however, are not well satisfied with the allotment of one-fifteenth or one-twelfth part of the land inclosed that is usually made to them by the commissioners, but have lately made attempts to enclose, not under the recent Acts, but under the ancient statute of Merton, and in entire disregard of the fact that this statute has no application to commoners who are copyholders. What is everybody's business is done by nobody, and the result is that various acts of aggression have been permitted, to which Mr. Cole directs attention. Epping Forest, Wimbledon Common and Lord Spencer, Wandsworth Common, Clapham Common, Tooting Common and Mr. Thompson, and Hampstead Heath pass under review in this readable little treatise. We meet with territorial aggressions in remote agricultural districts but we had no notion that they were tolerated to such an extent by the wealthy inhabitants of the metropolis and its suburbs.

Bracton and his Relation to the Roman Law. By Carl Güterbock, Professor of Law in the University of Königsburg. Translated by Brinton Coxe. Philadelphia: J. B. Lippincott & Co. London: Trubner & Co., 60, Paternoster Row.

At one time, English lawyers contended that the development of the English law was the natural indigenous product of the English soil, and that it had in no way been influenced by the Roman. But such opinions have long ceased to exist, and as the learned translator

says in his introduction, "judges and legislators have long acknowledged that the 'Corpus Juris' is an authority which is useful or rather indispensable for the English law," and the Roman law has now come to be regarded by the English as the great source of their common law. To understand, therefore, thoroughly the law as it existed in the time of Bracton (a valuable translation of which we noticed in our last number) it is absolutely necessary to investigate the history of the Roman law; and the aim of the author of this book has been to show in detail the Roman elements contained in the English law at the time of Bracton, so that it may be clearly ascertained how far the Roman law was adopted in the different institutions and branches of the English law, and how great was its influence in England at that particular period. The first part of the book we need not refer to at length, as it relates to the date, system, and method of Bracton's work, which was noticed in our last number. The author then goes on to show how much there was of Roman law in Bracton's time which was of practical validity in England, and says: "the reader of Bracton, instead of getting the impression that sometimes domestic and sometimes foreign materials are presented to him, finds before him the picture of an indivisible homogeneous whole, in which the Roman elements are no longer merely Roman law, but have become integral parts of the *leges et consuetudines Anglicanæ*."

The second part of the book investigates in detail the Roman elements and rules of law which were adopted and digested in Bracton. Here it becomes a work of practical utility, and is divided into two parts, the law of persons, and the law of things. As each of these subjects are divided into numerous subdivisions, it would be impossible in a short review to do justice to the work in detail, but to those of our readers who are fond of tracing English law to its fountain-head, we can recommend this treatise as full of learning and deep research.

A Treatise on the Law of Stoppage in Transitu. By John Houston, of the Middle Temple, Barrister-at-law. William Maxwell, 32 Bell Yard, Lincoln's Inn.

SOME time ago, there was a rage for "handy books" on all sorts of subjects, the professed object being to make every man his own lawyer. Now we do not in the least mean to include this book in the same category, but the learned author seems to intend it to answer the same good purpose, for he says in his preface that "it is intended not only for the profession, but for the mercantile community, seeing that emergencies constantly arise in commerce, where promptitude is so much an element of success, as to render the services of counsel unavailable." Whether the merchant will gain much by looking through this book to find a case on all fours with his own, instead of going to his attorney remains to be seen. But so far as the legal profession is concerned it is different; the learned author has divided his book into convenient chapters and subdivi-

sions, and has collected all the leading cases on the subject ; and as the facts are very explicitly stated, and in most instances (for it is impossible to examine all) the *ratio decidendi* is correctly given, it must be considered a useful work, particularly for those who have to practice where it is sometimes difficult to obtain reports. The table of contents, as well as the index, is arranged so as to enable the reader to find any particular subject with the least possible difficulty. The author does not lay claim to the merit of originality, for he mentions the names of many books to the writers of which his work is indebted for some of its leading principles. But it is some merit to have condensed within a small volume of some 230 pages all the leading cases on the subject, with the facts fully and clearly set out, without which it is difficult sometimes to understand the judgment, and often impossible to reconcile apparently conflicting decisions.

Oke's Magisterial Synopsis. Ninth Edition. By George C. Oke, Esq., Chief Clerk to the Lord Mayor of London. London : Butterworth, Fleet Street. 1866.

To say that a book has arrived at its ninth edition, is in other words to say that it has become a necessity for the legal profession. Probably, no magistrate constantly sitting at petty sessions, or solicitor practising in their courts, is without some edition of the work ; but of late years, the jurisdiction of magistrates has been so much extended, and the law altered by the late consolidation of the criminal statutes, that another edition had become positively necessary. It is sufficient to say that the present edition seems to have been most carefully got up, and is worthy of its predecessors. There is only one thing that we can suggest would be an improvement, which is, that in a future edition there should be an index of the statutes and sections referred to in the book, such as is to be found in Archbold's "Criminal Practice," which often serves to supply any deficiency in the ordinary index, and enables an advocate at once to see whether some old Act which has been quoted on the other side is to be found in the book, and where.

The view of Martial Law, and the power to try Civilians under a Military Commission in America. The argument of David Dudley Field, Esq., before the Supreme Court of the United States, in the matter of L. P. Milligan, W. A. Bowles, and Stephen Horsey, under sentence by Military Commission.

THE facts of the case were shortly these :—

"The petitioners were natives of the United States, and have been many years citizens of Indiana. Though not 'in the land or naval forces of the United States,' or connected in any way with the public service, they were arrested in September and October, 1864, at their homes in Indiana, by order of General Hovey, commanding the military district of Indiana, taken to Indianapolis, and there, in

October following, tried by a military commission and sentenced to be hung. The sentences were commuted to imprisonment for life, and they are now in the penitentiary undergoing this imprisonment. The charges upon which they were tried were five, viz :—

- “ ‘ 1. Conspiracy against the government of the United States ;’
- “ ‘ 2. Affording aid and comfort to rebels against the authority of the United States ;’
- “ ‘ 3. Inciting insurrection ;’
- “ ‘ 4. Disloyal practices ;’ and
- “ ‘ 5. Violation of the laws of war.’

We may here take up the thread of Mr. Field’s argument :—

“ While the petitioners were in prison, and nine days before the time appointed for their execution, each of them presented a petition to the circuit court of the United States, for the district of Indiana, setting forth the foregoing facts, with a copy of the charges, specifications, finding and sentence, and praying, that under the ‘ Act of Congress, approved March 3, 1863, entitled ‘ An Act relating to Habeas Corpus, and regulating judicial proceedings in certain cases,’ he may [might] be brought before this court by a writ of Habeas Corpus, or such other writ or order as the court [might] award for that purpose, together with the cause of his caption and detention, to do and receive whatever the court [might] upon full and final hearing, order and adjudge in relation thereto, in pursuance of the Act of Congress aforesaid, and that at all events he [might] be delivered from said military custody and imprisonment, and if found probably guilty of any improper conduct or offence against the United States of America, turned over to the proper civil tribunals for inquiry and punishment according to law, or for discharge from custody altogether.

“ Upon this application the judges were divided in opinion, and they sent to this court a certificate of their division, upon the following three questions :—

- “ ‘ 1. On the facts stated in said petition and exhibits, ought a writ of Habeas Corpus to be issued, according to the prayer of said petition ?’
- “ ‘ 2. On the facts stated in said petition and exhibits, ought the said [Lambkin P. Milligan] to be discharged from custody, as in said petition prayed ?’
- “ ‘ 3. Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein, had jurisdiction to try and sentence said [Milligan], in manner and form as in said petition and exhibits is stated ?’

“ The argument upon these questions naturally divides itself into two parts :—

“ *First.*—Was the military commission a competent tribunal for the trial of the petitioners upon the charges upon which they were convicted and sentenced ?

“ *Second.*—If it was not a competent tribunal, could the petitioners be released by the Circuit Court of the United States for the district of Indiana, upon writs of Habeas Corpus or otherwise ?

"The discussion of the competency of the military commission is first in order, because, if the petitioners were lawfully tried and convicted, it is useless to inquire how they could be released from an unlawful imprisonment.

"If, on the other hand, the tribunal was incompetent, and the conviction and sentence nullities, then the means of relief become subjects of inquiry, and involve the following considerations :—

"[1.] Does the power of suspending the privilege of the writ of Habeas Corpus appertain to all the great departments of government concurrently, or to some only, and which of them ?

"[2.] If the power is concurrent, can its exercise by the executive or judicial department be restrained or regulated by Act of Congress ?

"[3.] If the power appertains to Congress alone, or if Congress may control its exercise by the other departments, has that body so exercised its functions as to leave to the petitioners the privilege of the writ, or to entitle them to their discharge ?

"In considering the first question, that of the competency of the military tribunal for the trial of the petitioners, upon those charges.

"Let me first call attention to the *dates* of the transactions.

"The commission was created by general order, dated Sept. 17, 1864, directing a military commission to convene at Indianapolis, for the trial of Harrison H. Dodd, and such other persons as might be brought before it. The arrest of Bowles was made September 18 ; of Milligan, October 5 ; and of Horsey, October 14. The petitioners were brought before the commission October 21 ; the trial lasted to January 1, 1865. On the first Tuesday of November, 1864, the Circuit Court of the United States convened at Indianapolis ; it continued by adjournment to January 2, 1865, remained in session till January 27, and then adjourned for the term. The Circuit Court for the southern district of Illinois sat at Springfield in June, 1864, and January, 1865, and for the northern district, at Chicago, on the first Monday of July and the third Monday of December, 1864. The record of this military trial slept in the War Department from January to May 2, 1865, on which day it for the first time appeared, as an authentic document, containing an approval of the finding and sentence, and an order for the execution. On the 10th of the month the petitioners made their application to the Circuit Court.

"Bearing in mind that the promulgation of the proceedings by the War Department was on May 2, 1865, let me refer to certain facts of public notoriety, of which the court will take judicial notice. On April 3, 1865, the power of the Confederacy were crushed to atoms ; when the rebels fled from Richmond. On April 9, Lee surrendered. The chief of the rebel government was a fugitive, closely pursued by horsemen, till he was finally captured on May 11. Mobile was taken April 13 ; Johnston surrendered April 25 ; and Taylor gave up the last rebel force east of the Mississippi May 4.

"On the morning of the day when these men were to be hanged at Indianapolis, upon the plea of military necessity, there was not an arm raised against the Government between the Atlantic and the

Father of Rivers: all was submission, from the Rio Grande to Katahdin.

"October 21, 1864, when this military trial began, there was not only no enemy in arms within the states of Indiana and Illinois, but none within hundreds of miles.

"Let it be observed next, that for the same offences as those set forth in these charges and specifications, the petitioners could have been tried and punished by the ordinary civil tribunals. For 'conspiring against the government of the United States;' for 'affording aid and comfort to rebels against the authority of the United States;' for 'inciting insurrection;' for the 'disloyal practices' set forth in the five specifications under that charge, and for the 'violation of the laws of war,' set forth in the two specifications under the fifth charge, penalties considered sufficient by the law-making power had been already declared, and ample provision had been made for indictment and trial in the ordinary courts.

"Treason, as everybody knows, is defined by the Constitution, and its punishment is prescribed by Act of Congress.

"But we know from other sources that Indiana and Illinois were at peace. Appeals have been regularly brought hither from the courts of those states. You, Mr. Justice Davis, and your associates in those districts, know, from the records of your own courts, whether or not cases have been regularly tried, and the laws have had their course in Indiana and Illinois; and of that you are, for good reasons, the best judges."

Mr. Field then goes through all the leading authorities that bear upon the subject, and thus concludes a speech as remarkable for its learning as for its eloquence:—

"And so we submit to the Court, that the answers to the three questions certified by the Court below, should be, to the first, that, on the facts stated in the petition and exhibits, a writ of *habeas corpus* ought to be issued according to the prayer of the petition; to the second, that, on the same facts, the petitioners ought to be discharged; and to the third, that the military commission had not jurisdiction to try and sentence the petitioners, in manner and form as in the petition and exhibits is stated.

"Thus, may it please the Court, have I performed the part assigned me in the argument of these cases. The materials were abundant. I only fear that I may have wearied you with the recital or erred in the selection. I could not look into the pages of English law—I could not turn over the leaves of English literature—I could not listen to the orators and statesmen of England, without seeing everywhere an almost unbroken denunciation of martial usurpation, and the declaration of the undoubted right of every man, high or low, to be judged according to the known and general law, by a jury of his peers, before the judges of the land. And when I turned to the history, legal, political, and literary, of my own country—my own undivided and for ever indivisible country—I found the language of freedom intensified. Our fathers brought with them the liberties of Englishmen. Throughout the colonial history, we find the colonists

clinging, with immovable tenacity, to trial by jury, Magna Charta, and the Petition of Right. They had won them in the fatherland in many a high debate and on many a bloody field ; and they defended them here against the emissaries of the Crown of England and against the veteran troops of France. We, their children, thought we had superadded to the liberties of Englishmen the greater and better guarded liberties of Americans.

“ These great questions, than which greater never yet came before this most august of human tribunals, are now to receive their authoritative and last solution. Your judgment will live when all of us are dead. The robes which you wear will be worn by others, who will occupy your seats in long succession, through, I trust, innumerable ages ; but it will never fall to the lot of any to pronounce a judgment of greater consequence than this. It will stand, when the statue, which with returning peace we have raised above the dome of the Capital, shall have fallen from its pedestal, its sword broken, and its shield scattered in pieces ; nay, when the dome itself, which, though uplifted into the air, seems immovable as the foundation of the earth, shall have crumbled ; it will stand as long as that most imperishable thing of all, our mother tongue, shall be spoken or read among men.

“ That judgment, I hope and I believe, will establish the liberty of the citizen on foundations never more to be shaken, and will cause the future historian of our greatest struggle to write that, great as were the victories of our war, they were equalled in renown by the victories of our peace.”

Legal and Equitable Rights and Liabilities as to Trees and Woods.

By Richard Davis Craig, Esq., one of Her Majesty's Counsel.

Maxwell, Bell Yard, 1866.

A SHORT treatise on the above subject has been long wanted, and is at last supplied by one of the ablest and soundest lawyers of the Chancery Bar. In his preface the learned author states, that having had occasion, in the early part of the year 1863, to investigate a question discussed in the work “ he was thus reminded of an opinion he had long entertained, that a collection of the decisions on the subject of timber and trees would be interesting and useful. He thought that the leisure of a long vacation would afford ample time for this purpose, and he applied himself then to the task, but found he was mistaken as to its duration. The great amount of trouble which its prosecution has occasioned to him, confirms his belief, that he will have saved much time to his friends by bringing together materials so widely scattered, and arranging them in some kind of order.”

Mr. Craig has not been wrong in his calculation, though he might have carried it farther ; for all mankind feel an interest in trees, woods, and forests. The attraction of this book, therefore, is not confined to the legal profession.

Before touching on certain of the points so usefully handled by Mr. Craig, we may observe, that the subject of his treatise is capable of a three-fold discrimination—the generic term “tree” embracing, but being at the same time distinguishable from, timber and woods. The word tree requires no definition, though Dr. Johnson tells us that it is “a large vegetable, rising with one woody stem to a considerable height.” Wood, again, is a collection of trees without reference to their age or dimensions—while those classed as timber indicate wood fit for building, the term being applied to trees both before and after they are felled. The general rule is, that trees properly ranked as timber must consist of oak, ash, pine, elm, or walnut—although by the custom of certain districts birch, and even aspen and willow, are accounted timber ; but incorrectly so, for evident reasons.

In the exercise of jurisdiction with reference to the subject of Mr. Craig’s work, waste at law has special reference to timber—whereas waste in equity has a much wider signification, and extends to trees, however insignificant, should they happen to be of use for ornament or shelter.

With reference to legal and equitable rights as between lessor and lessee, Mr. Craig observes that, “The rights of the lessee are—to enjoy the shade, shelter, and fruit of the trees; to cut down and appropriate all such of them as are not timber, or fruit trees, unless planted or left standing for ornament, or unless affording permanent shelter or shade ; to lop those which are timber, for necessary repairs of hedges, and husbandry-implements, and for fuel, and, if necessary, to cut down the timber-trees themselves for repairs to houses and principal buildings. These rights for repairs and for firing are described as his ‘botes.’

“The bodies of dead timber-trees, when blown down by the wind, or cut by the lessor, are absolutely the property of the lessee ; and he may fell them himself if they are obviously dead.

“The lessee may trim hedges, but he must not root them up. The trimmings will belong to him.

“Any excess in the exercise of the lessee’s rights in these respects will be waste ; and, in particular, it will be waste to cut or lop timber-trees except for such necessary repairs and fuel as can only be supplied by means of those trees or their loppings.”

Some of the nicest and most difficult questions arise as to the conflicting rights of tenant for life, and remainderman. Mr. Craig tells us that :—

“The tenant for life stands in much the same relation to the remainderman, as the lessee to the lessor ; and most of the early life estates are treated as leases for life, which, in fact, they were, before limitations for life in settlements and wills had become (as they now are) much more frequent than leases for life.

“Thus, a tenant for life is, generally speaking, entitled to act, with respect to timber and other trees, just as a lessee for years can, and not otherwise ; and he is liable to be impeached (that is, complained of) for waste, upon the same grounds as a lessee for years.

"The difference, in practice, between the two cases, arises from the frequent exemption of the tenant for life from the consequences of waste, by expressly declaring his life estate to be 'without impeachment of waste,' *absque impetitione vasti*; a form of words which Lord Coke thinks to have been in use as long ago as the time of the statute of Marlebridge, in the 52nd Hen. III.

"The effect of these words has been gradually extended, by construction, to relieve the tenant for life from both the common and statute law penalties of waste, and also to entitle him to convert the subject of waste to his own use and profit; but this extension was not made without opposition and doubt; and it may, obviously, be the means of much abuse of power. That abuse the Court of Chancery has attempted to restrain, and it has, from time to time, established rules for such restraint; and those rules amount, practically, to so considerable an exception from the meaning of the words, 'without impeachment of waste,' that it is impossible to understand what the rights of a tenant for life really are, with respect to timber and trees, without bearing in mind the equitable restraints imposed on the legal licence.

"Thus, although a tenant for life, without impeachment of waste, might, legally, demolish all the dwelling-houses on the property, and convert their materials to his own use, without rebuilding any one of them, the Court of Chancery will restrain him from doing anything of the kind; upon the principle that this would always be an unconscientious, and often a malicious, exercise of his legal powers; and although he might, legally, cut down every stick of timber upon the estate, the Court of Chancery will prevent his cutting any trees planted or left standing for ornament or shelter, whether timber-trees or not, and any saplings or young trees not fit to be felled, and, in fact, from doing any other kind of waste which would be destruction. This jurisdiction has led to the use of the term 'equitable waste,' which denotes, partly, a kind of destruction which would not be waste at law, such as the cutting of trees which are not timber, if they have been planted or left standing for ornament, and, partly, that kind of legal waste which equity does not allow any expressed immunities to justify.

"The same court, however, also interferes, to restrain mere legal waste, either for the sake of giving prompt support to the legal right, in cases of urgency, or because some technical impediment prevents legal process being available; and thus it is sometimes obliged to determine the legal questions, what is waste, or is not, and who may commit it, or not."

In dealing with the caprices of tenants for life, unimpeachable of waste, the ruling of Lord Chancellor Harcourt in the Raby case* may be regarded as the germ of equitable intervention to prevent wanton and malignant mischief deemed perfectly allowable at law. The case was as follows:—

Lord Barnard, on the marriage of his eldest son, settled Raby

* 2. Vern. 738.

Castle on himself for life, without impeachment of waste, remainder to his son for life, and to his first and other sons in tail male.

His lordship, having afterwards taken some displeasure against his married son, got 200 workmen together, and of a sudden in a few days stript the castle of the lead, iron, glass-doors, and boards, &c., to the value of £3,000. He then proceeded deliberately to demolish the castle, and pulled down one of the rooms, and sold the timber, lead, iron, glass and other materials, and converted the money, being a considerable sum, to his own use, "the joists on which the floors were laid being each a whole oak tree, the said castle having been very strongly built and made use of for a fortification." On the son's application, Lord Chancellor Harcourt, in 1716, granted an injunction to stay the waste, or rather the wanton destruction of the castle; and decreed that it should be repaired and restored to its original state; and for that purpose a commission was issued to ascertain what ought to be done, and a master was ordered to see the work executed at the expense and charge of the defendant, who was condemned in all the costs.

The remarkable thing in this case is, that the conduct of Lord Barnard, viewed legally, was quite unobjectionable, though censurable and subject to correction in equity. Lord Hardwicke has intimated an opinion that it would have been for the benefit of families if the common law had not given such large powers to tenants for life unimpeachable of waste. And Lord Mansfield, advertng to the distinction which had been introduced between waste and destruction, has made this important observation—"I agree with the counsel at the bar that when a general rule of property is established in equity it should be followed at law." * The common-law lawyers, it is to be hoped, will attend to this admonition.

The rule in equity is that the taste of the settler, however bad, binds the court. Hear Lord Eldon, who on this point is almost facetious—

"The question is not, whether the timber is or is not ornamental; but the fact to be determined is, that it was planted for ornament, or, if not originally planted for ornament, was left standing for ornament, by some person having the absolute power of disposition? If such a proprietor had even the bad taste to plant or leave standing a couple of yew trees, cut in the shape of peacocks, on the roadside, they must be protected, until some person, having the same absolute power of disposition, with more correct taste, comes into possession."

The following passages are interesting and satisfactory as showing the property in windfalls, distinguishing among other particulars, the cases where timber trees are sound, from the cases where they are unsound.

"As between lessor and lessee, the right to windfalls of timber-trees which are decayed is in the lessee (4 Co. 63, b.). Even although the lease contain a reservation of all timber-trees, yet, if, at the date of the lease, the tree was decayed, and incapable of being

* 1 J. R. 56.

used as timber, it is not considered to be within the words of the reservation ; and, therefore the lessee may claim it. So, if the windfall be of trees which are not timber in their nature, it would seem that the lessee may claim them, if not prevented by exception, reservation, or otherwise ; for, since he might cut them down, he must be entitled to pick them up.

"If timber-trees blown down be sound, they will belong to the lessor, as between him and the lessee ; but whether the lessor's interest in them will be absolute, must depend upon his estate in the land. If he be tenant in fee, or in tail, in possession, and whether an infant or of full age, the property must vest in him absolutely. If he be tenant for life, without impeachment of waste, he may appropriate them to his own use. If he be tenant for life, impeachable of waste, it is clear that he is not absolutely entitled to them ; and, until the time of the present Master of the Rolls, it seems to have been thought that he could not even claim a life-interest in their produce.

"In *Lushington v. Boldero*, 1851, Lord Romilly, M. R., says (15 Beav. p. 7) : ' Undoubtedly, the tenant for life does, in some cases, directly gain an advantage ; but it is not by reason of his own act. Thus, where, by the act of God, a large quantity of timber is blown down by a storm, the produce is laid out in the purchase of stock, and the interest of the fund is paid to the successive tenants for life. So, upon the same principle, when timber is decaying, and it cannot benefit the reversioner to allow it to remain standing, the Court, having ascertained that it is for the benefit of all parties, orders the timber to be cut down, and the produce to be invested, and the interest of the fund to be paid to the tenants for life in succession.'

"The case then before his Lordship was not one of a windfall ; and it is believed that there had not then been any instance in which windfall produce had, in fact, been treated as he suggested.

"In the very recent case of *Bateman v. Hotchkiss*, before the same Judge, in 1862 (31 Beav. 486), where timber had been blown down by a storm during a tenancy for life, impeachable of waste, his Lordship was disposed to give the tenant for life the interest of the fund produced by the sale of the timber, and seems to have expressed a written opinion in Chambers to this effect : ' In the case of timber blown down by a storm, there is no waste, because it is the act of God, but the produce of the sale belongs to the inheritance ; that is, the money must be invested in Consols, and the interest paid to the tenant for life.'

"If timber blown down is to be deemed part of the inheritance of the lands (which seems reasonable), the mode of applying its produce which Lord Romilly has thus pointed out, namely, by giving to the existing tenant for life, impeachable of waste, a life income in it, instead of at once handing over the capital to a remainderman, who may never live to come into possession, seems most consistent with principle.

"If trees be 'dotards, without any timber in them,' (which seems to mean if they have become decayed, whether pollards or

not), and they be blown down by the wind, the property in them vests in the lessee and not the lessor."

Our space does not permit us to give further extracts from this instructive little volume. But we think we have said enough to show how very useful it must prove to the professional practitioner. All the cases are given with commentaries, and, when necessary, with cautions, which derive weight and authority from the high standing and long experience of the author. To say this, however, is not enough, and therefore we confidently recommend the book, not only to lawyers, but to every owner of "trees, timber, and wood," in the kingdom.

The Law of Wills as administered in the Court of Probate in England. By F. A. Inderwick, Esq., of the Inner Temple, Barrister-at-law. London: William Maxwell. Dublin: Hodges, Smith, & Co. 1866.

THIS is a really very useful book, and is so well and fully described by its title, that we need scarcely notice it except in order to say, that the practitioner who requires in a convenient, concise, and well-arranged form, the principles by which the Probate Court is guided with regard to wills, will find here, we think, precisely what he requires. We have tested the work on various points, and have found the result altogether satisfactory.

The volume, consisting of about 160 pages, is divided into five chapters, treating, respectively, of the capacity to make a will, of the form of making and executing a will coming within the provisions of the Wills' Act of 1837, of the revocation of a will, of the revival of a will, and of the presumption of death. The matter of these is divided and sub-divided, and minutely described in an unusually full table of contents. There is also an index, and an appendix, containing the Wills' Act, and its Amendment Act of 1852. The rules and principles contained in this book are clearly and well expressed, and well supported by quoted cases. The work has also the not too common merit in books of practice, that while no space is wasted in the discussion of the various points, the reader is at once and without difficulty led to where their discussion may be found. The author is evidently master of his subject, and appears to have taken great care and pains in its arrangement and treatment; and these also are merits in which the compilers of modern law-books are apt to be sometimes deficient. The result of this knowledge and care is a very complete, clear, and accurate volume for practice and reference. We would, however, suggest that the table of contents should have contained a reference to the pages where its various headings are to be respectively found, and that the index should have been rather fuller. The means of reference to a law-book cannot be too complete.

Institutes of Jurisprudence. By William Austin Montrieu, Advocate of the High Court, Bengal. Calcutta : P. S. D'Rozario & Co. Cambridge and London : Macmillan & Co. 1866.

MR. MONTRIEU, in his dedication to Lord Stanley, describes his work thus—"My object is, to bring within convenient compass a categorical and didactic exposition of the elements and principles of jural science. The work is a *resumé* (methodised and compressed) of oral lectures delivered to the law classes of our Presidency College ; its primary intention, therefore, is to aid those who have composed, as well as all those who may compose, the college classes."

Regarding this primary intention we must assume that the author, after the eight years' experience of which he speaks in the same dedication, is properly qualified to know what kind of elementary treatise is best suited for the students, whose teacher he has been. We have no doubt, also, that a collection of lectures which they have heard will be a useful and interesting possession for the late members of his law classes. But the volume requires further notice at our hands, both in the interest of other students into whose hands it may fall, and also because the publication of an elementary book on jurisprudence in English has not yet become so common that the appearance of one should, as yet, ever be overlooked.

Before awarding to this volume the praise that we think it deserves, we will point out one or two faults that are really very great, and which are the more provoking as they might easily have been avoided. In all books for students clearness and accuracy are the most needful qualities. Now, in opening the volume at the first page of the first section, we were struck by the following strange passage, the object of which seems to be to explain to the reader the meaning of the word law. The italics are our own :—

"Law, in the *widest* sense, is the action of a principle of uniformity or order : *its existence implies authority and implies restraint : it is a means to an end : it is a mode, a condition of being or of acting.* Such are incidents or intrinsic qualities of law, *however the term be applied.*" The paragraph then goes on to exemplify this definition by the laws of the solar system, &c.

Now who would suppose that this was written by one who, as a writer on jurisprudence, must be assumed to be aware of the complete and admitted difference, in point of meaning, attaching to the word *law*, when used metaphorically to express the invariable sequences of phenomena—as, for instance, in the phrase, "a law of nature"—and when used in its proper sense to express a command, whether divine or human? When the word law is applied, for example, to the law of gravitation, it does not necessarily imply authority ; it merely implies the fact that certain phenomena always, as a fact, follow certain other phenomena according to our experience. Nor, in the same sense, can a law be said to be a means to an end. On the other hand, what does the author exactly mean.

when he, by making certain qualities incident to law, "*however the term be applied,*" necessarily leads the student to infer that the command to pay a debt, for example, is a condition of being or of acting? Possibly, the passage may be twisted into a right meaning; but, after carefully reading the rest of the section bearing upon it, with a special view to the solution of the difficulty, we are still as far as ever from being certain that the author is aware of the difference of which we have spoken; and we are certain that, in any case, he has been neither clear nor accurate. The same kind of faults, in respect of clearness and accuracy, occur in almost every case where the author touches upon first principles and fundamental definitions.

We think, also, but with more deference, that the work would be very much improved if a great many of the notes had been omitted, when they do not immediately or closely bear upon the subjects which they illustrate, and if a great many of those which should be retained were, as might in all cases easily have been done, incorporated [with the text. As it now stands the volume is somewhat confusing to read. In short, we admit that by the time we had reached the end of the first two sections, and of their notes, and had also seen the generally confused appearance of the volume, we were prepared to take a very unfavourable view of the whole. A further examination, however, showed that had we taken the view for which we were prepared we should have proved ourselves very unjust. Mr. Montriou certainly does not show himself to be a master of system or of analysis; but he has most clearly shown himself to be a master of the matter of which he treats, to be accurate in his facts and his details, and to be well and largely read, not only in the special subject of his work, but in the learning and information that are connected with it, and that in any way bear upon it. Anyone who may carefully study this volume will acquire a very great amount indeed of information, almost all useful to him as a student of jurisprudence, and all interesting. We therefore must, on the whole, recommend it, especially to students of the systems of law that prevail in India; while, at the same time, we advise its readers, if they wish to gain a true and accurate idea of what the nature and definition of law are, to seek it elsewhere. It appears from the preface that this volume is only the first part of the work, and that a second is to follow. We hope that nothing will prevent the fulfilment of the design, and that the second part, and all future editions of the first, may be free from faults so easily avoided, and which interfere so much with what promises to be a really valuable addition to the libraries of students of jurisprudence, whether Indian or English. Its completion will afford us an opportunity of treating the whole work at a length and with a minuteness more proportioned to its merits and to the care and labour that it has, so far, evidently cost,

A Handy Book on the Law of Merchant Shipping. By T. H. James, M.A., Barrister-at-Law. London: Sweet, Chancery Lane. 1866.

HANDY BOOKS and manuals are generally either too much or too little—too much for the non-professional person who consults them, and too little for guidance to the practitioner, and so the matters treated of in this little book are of too much importance to be guided by the intelligence of the merchant shipowner or charterer solely by its aid, through the labyrinth of liability or non-liability incident to large transactions. The size, a little over a hundred small pages, into which such a subject is here comprised, at once precludes its being more than a summary, and a very short one, of that whereon it treats. And we can only imagine it valuable to students as an abstract of the larger work of Maud and Pollock, though of use as a book of reference to the merchant community. Still the work is well done, and so far as we have been able to judge is a very good *resumé* of the law of merchant shipping. We subjoin the chapter on hypothecation, which will furnish a fair test of the way the author has executed his task and condensed the matter of the larger work.

1. *Hypothecation*.—Hypothecation is a contract of pledge, whereby, in consideration of money advanced for the necessities of the ship, the vessel, freight or cargo is made liable for its repayment, provided the ship arrives in safety; and it is usually effected by a deed called a bottomry bond.

The right of the owner to hypothecate is not limited, as is that of the master, to cases of necessity; the latter may hypothecate the ship, freight or cargo, in cases of necessity only. Necessity is the very foundation of this right. If the master, when in a foreign country, or when placed in any other position in which it is impossible to communicate with his owners, is in want of money to repair or victual the vessel, or for other necessities, he is bound, in the first instance, to endeavour to raise it on the credit of his owners; if he can do so, he must; but if he cannot otherwise obtain the money, he may hypothecate. The money must be needed for the ship, and for her present voyage.

As a bottomry bond is altogether void if executed under circumstances not warranting the hypothecation, the lender must, at his peril, ascertain that a necessity for the loan exists, *i.e.*, that without an advance of money the ship cannot proceed, and that such advance cannot be obtained on personal credit. But he is not bound to inquire into the expediency of the intended repairs, unless they are so flagrantly inexpedient as to raise a presumption of fraud; nor is he bound to see to the proper application of the money when borrowed.

In raising money upon bottomry, the master acts exclusively as agent of the shipowner, although the sum requisite for the repairs may exceed the value of the ship when repaired, and the master may be therefore obliged to hypothecate the cargo as well as the

ship. But the shipowner is bound to indemnify the owner of the goods against the consequences of the hypothecation.

When the goods are supplied or the advances made, there must be an agreement that the amount shall be secured by hypothecation, and not by personal credit only. Bills of exchange are often given as collateral securities, and do not affect the validity of the hypothecation. The repayment of the money must also be dependent upon the ship's arrival at her destination.

As these instruments are the creatures of necessity and distress, and usually contain the language of commercial men and not of lawyers, they receive a liberal construction.

The contract of hypothecation being a mere chose in action, is not assignable at law, but in the Court of Admiralty it is considered to be assignable, and proceedings may be taken on it against the ship by the person to whom it is transferred.

2. The hypothecation of the ship does not render the shipowners liable to be personally sued. The remedy of the creditor is either against the master himself or against the ship, which is liable, into whosoever's hands she may come. The usual and most beneficial remedy for the holder of bottomry bond, is a proceeding *in rem* in the Admiralty Court against the ship, freight, or cargo.

The holder of a bond is in this court entitled to priority over all the other creditors, except claimants for wages; but *inter se* the bondholders are, in the absence of special circumstances, entitled to priority in an inverse order, the last being paid first, as the last necessary loan saves the ship, and renders the other securities available.

3. The principles which govern the right of the master to sell the ship are similar to those which have been mentioned as justifying a hypothecation; the two most important points to inquire into in each particular case are, whether the course pursued was absolutely necessary, and whether the master acted with *bonâ fides* in the transaction. If the termination of the voyage is hopeless, and no prospect remains of bringing the vessel home, and nothing better can be done for his employers, the master may sell the ship for the benefit of all concerned, but if the sale be not justifiable, no title to the ship passes to the vendee.

The master may, in cases of absolute necessity, *i.e.*, where there is a total inability to carry the goods to their destination, sell a part, or even the whole of the cargo; and such a sale transfers the property and binds the owners of the goods. In the case of a wrongful sale, the shipowner is liable in an action on the case at the suit of the owner of the goods.

If the master necessarily sells the goods at an intermediate port for repairs, and the ship afterwards arrives at her destination, the shipper may at his option, claim from the shipowner either the price for which the goods actually sold, or the amount for which they would have sold at the port of discharge. If, however, the ship is lost on her voyage home, the shipper cannot claim the amount for which his goods would have sold had the ship arrived. Whether,

in this case, he is entitled to the price for which they actually sold, has never been determined in our courts.

Hunt on the Law relating to Boundaries and Fences. London : Butterworths. 1866.

THIS is a very useful work, as a common-place book on the subject of which it treats. It is the work of a student, who has carefully collected together all the cases he could find on the subject, and all the various matters to be found under the head of boundaries or fences, in the writers to which he has had access. These he has arranged in chapters, to the number of 16. He has given us a table of cases, a list of statutes, and an index, *voila tout*. He has acted as an eclectic, and this book is the result; and, as saving the trouble of turning over many authorities in search of cases, and having them all comprised in one volume, it will be valuable. But if we are not much mistaken, the Editor, we cannot call him the Author, is capable of better things.* What is wanted in a treatise on the law is, not simply an aggregation of cases, but a mind vigorously and intelligently employed, to make order out of chaos—to elicit principles—to set up great marks by the way—to point out the exceptions—to guide us in the dark and narrow byways—and to protect us by fences where we are in danger of straying from the right—and by clearly defining the boundaries, where the road is uncertain and the path obliterated. This is not here accomplished. Neither do the cases quoted in the work always satisfy us, they are sometimes *dicta*, not judicial, sometimes not apt, and in some cases not correct in their bearing or application. It is sufficient, however, without further entering into the merits or demerits of this first attempt, to invite the writer to further effort, fully believing he will, if he honestly labour at the work, produce a book entitled to become an authority on the subject of boundaries.

The Old Northern Runic Monuments of Scandinavia and England, now first collected and deciphered by Professor George Stephens, F.S.A. Part I. London : John Russell Smith. Cheapinghaven: Michaelson & Tillage. 1866.

THE publication of this great work is a most important event in the science of archæology. In our language, character and national institutions there are stronger Scandinavian elements than we have

* It is said that a learned judge owed his elevation to the bench to the fact that the Lord Chancellor of the day had turned to a book written by the former for answers to four questions, all which he found, and all correctly given. We have not been so fortunate in our quest. Confining our attention to the subject of waste lands, and waste bordering highways, some of our questions are not answered, and some in a manner not satisfactory to us. We may specially note, as requiring reconsideration and reconstruction, the influence of inclosure acts on rights of ownership, as between lords of the manors, commoners, and the public.

often allowed. "Almost every sound," said Mr. Marsh, in one of his lectures on the English language, "which is characteristic of English orthoepy is met with in one or other of the Scandinavian languages." The elements that now make up the British nation were derived from the whole tract of land that extends from Brittany to Norway. "If the men of Brittany," says Kohl, "the Northmen, the Flemings, the Frisers, the Saxons, and the Jutlanders were once more to send their colonists to the great Island, and their sons and daughters were there to intermix and intermarry, after a couple of centuries we should again see an English nation spring from their loins." Every book that throws light upon old Runic literature, and upon the manners and life of the old Scandinavians, must have a great interest for Englishmen. Professor Stephens has devoted to the elucidation of old monuments and remains an amount of learning and research that are rare, and that awake our astonishment as much as our admiration. The whole book is illustrated by engravings beautifully executed, and forms not only an important, but also a necessary addition to the library of the antiquary. We shall refer to it at greater length in our next number. In the meantime, we invite the attention of scholars and archæologists to the publication of what is truly a great work.

Institutes of the Laws of Ceylon. By Henry Byerley Thomson, second Puisne Judge of the Supreme Court of Ceylon, &c. Vol. I. London: Trübner and Co., Paternoster Row. 1866.

THE enterprising publishers of this work, which is now in the press, have sent us a part of it in proof, which we have read with interest. The book promises to be one of great value. The author writes with that ease and power which result from a masterly knowledge of the subject about which he treats. We hope to be able to notice the work at some length in a future number.

Books Received.

Ayckbourn's Practice of the High Court of Chancery. Eighth Edition. By J. Napier Higgins, Esq., Barrister-at-Law. London: Wildy & Sons. 1866.

The Law of Partnership. By Joseph Dixon, of Lincoln's Inn, Esq., Barrister-at-Law. London: Butterworths. 1866.

Treatise on the Law of Scotland relating to Parent and Child and Guardian and Ward. By P. Frazer, Advocate. Second Edition. By Hugh Cowan, Advocate. Edinburgh: Messrs. Clerk. London: Stevens & Sons.

A Treatise on the Jurisdiction, Pleadings, and Practice of the County Courts in Equity. By E. C. Batten, M.A., and Henry Ludlow, M.A., of Lincoln's Inn, Barristers-at-Law. London: Ames. [This is decidedly the best book on the subject that has yet been published.]

The Case of Long v. Bishop of Cape Town, embracing the Opinions of the Judges of the Colonial Court, hitherto unpublished, &c. London : Butterworths. 1866.

Results under the Last Bank Charter Act. By Charles M. Willich, late Actuary and Secretary to the University Life Assurance Society. London : Longmans & Co. 1866.

Remarks on the late Report from the Select Committee on Bankruptcy, &c. By Arthur James Johnes, Esq., Judge of the Mid-Wales County Courts. London : Wildy & Sons. 1866.

The Law of Partnership and Joint Stock Companies. By Francis W. Clark, Advocate. In Two Vols. Edinburgh : Clerk. London : Stevens & Sons. 1866.

A Treatise on Martial Law, as allowed by the Law of England in time of Rebellion, with Practical Illustrations drawn from the Official Documents in the Jamaica Case, &c. By W. C. Finlason, Esq., of the Inner Temple, Barrister-at-Law, Author of "Common Law Procedure," &c. London : Stevens & Sons. 1866.

Events of the Quarter, &c.

THE FENIAN CONSPIRACY.

SOME considerable time before the commencement of this year, it was known to the Government of this country that a deep-laid conspiracy existed in Ireland, but it was not until the early spring that it was considered prudent and necessary to take active steps to suppress it. Every one of our readers can remember with what excitement they perused the morning papers to see what news there was from Ireland; how regiments were ordered there on almost a moment's notice; the application for the suspension of the *Habeas Corpus*, which Parliament thought of such imminent importance, that they so far broke through their ordinary rule as to continue their debate until late on Saturday night, and passed their Bill, the Royal assent having been given on Sunday morning. No one will forget the captures which appeared on Monday morning. No one who has the interest of Ireland at heart, can, now that the excitement has died away, look back with anything but pleasure and pride at the way in which the Government behaved in this most difficult and trying position; and those who still have hopes for Ireland's future will derive comfort from the consideration that the verdicts of the different juries who were empanelled throughout the country to try the principal offenders show, beyond doubt, that the middle class, from which the jurymen are drawn, is at least without taint—a class upon which so much depends in troublous times; for never was there a time when there was greater inducement if disaffection had existed among them, to give contumacious verdicts; and probably there never was a list of important cases tried in any country where juries more attentively listened to and acted upon the law, as laid down to them by the judges, and found verdicts more righteous or more consistent with the facts. There is no wonder, then, that the traitors to their country, startled by the sudden and determined action of the Government, and finding that when detected and tried by their countrymen they could hope for nothing but a fair trial and a verdict of guilty if the evidence was clear and conclusive against them, should have sought an asylum in a foreign country. America was the country to which they naturally turned, where thousands of their countrymen were ready to aid them in anything which could obtain Ireland for the Irish and humble England, which they looked upon as the beginning of all their troubles. But the anxiety of this country, however, did not cease with the stamping out of this conspiracy in Ireland and its subsequent removal to what may be called the land of its birth.

Those who best knew how to understand and appreciate the bluster of a Fenian parliament in New York, laughed at the gigantic armies and navy which were to go forth and at one fell swoop to conquer Ireland, and sweep the British flag from the face of the deep. But still where there is smoke there is, at least, danger of a fire which, once it breaks out, no one can tell where it may end, and it must be closely watched if within its reach there are inflammable materials. That there are in America hundreds of thousands of Irish, who have either themselves left their country, or who are descended from Irish parents, who look upon England with undying and unreasoning hatred, unhappily there is no doubt. A great number of these men had served as soldiers during the years of civil war in America, and, brave and impetuous as Irish always are, they were ready to join in anything which promised excitement, a prospect of enriching themselves, and which, at the same time, would be the means of wreaking their vengeance upon this country—to such men it was only necessary to whisper the word Canada to make them turn their eyes in that direction. A country of great natural wealth, of almost boundless extent, which, in itself, must always be more or less a source of danger when threatened by invasion. The danger seemed imminent. The Canadians were alive to it. Everyone in this country looked with anxiety lest the calamity which had so nearly befallen Ireland, should in another form alight upon Canada. But the fears were soon found to be unnecessary, for bravely and right well did the Canadians behave; they saw their danger and they faced it. The militia and the volunteer force were called out, immediate preparations were made to defend all those points upon the frontier which were most open to attack. Under these circumstances it was the duty of every man in his own particular line, to aid the common cause. There is often more done by a handful of soldiers who have had their spirits roused by a few cheering words from their favourite commander, than if they had been reinforced by a thousand comrades. Who can say how much the never-to-be-forgotten words, "England expects that every man this day will do his duty," had to do with the victory of Trafalgar?

Just in the same way, it is impossible to say how much good is done when in the hour of danger the voice of warning is raised by one who never speaks without being listened to. Many are undecided in their views generally, some few may have a sort of hazy notion of their duty to their Queen and country—such men listen to or read the speech of a master mind, and they are at once decided and loyal. It generally happens that such a speech, if made at all, is made by some member of a government, or popular member of the legislature, but not necessarily so, for if we turn to Canada we find the Chief Justice delivering just such a speech as we have endeavoured to describe, in his charge to the grand jury at Toronto, at the spring assizes of this year. It was much talked of in Canada, and it is a pity that it should not be known in this country, where every one entertains the same feelings towards the Canadians that they feel for us. What falls from a judge, and such a judge as the

Chief Justice of Canada, upon the bench, in discharge of his judicial duties, cannot be out of place for us to notice. As there is such identity of interest between this country and Canada, and the Chief Justice thought it of sufficient importance to call forth observations while sitting on the Bench, we give them *in extenso*. "We may, therefore," in the words of a Canadian journal, "make no apology for following in this matter the lead of one whose example may well be followed, whether we look upon his career as a lawyer, as a judge, or as a loyal subject, jealous for the honour of his Queen, and faithful to the interests of his adopted country. Few, we think, will cavil at his views thus publicly expressed. Whilst we on our part are proud to accept them as our own."

His lordship opened the Toronto spring assizes on Monday, March 19, and in his charge to the grand jury, after referring to their duties and commenting upon the calendar placed in his hands, spoke as follows:—"As a general rule, courts and judges abstain from making observations to grand jurors on public or political matters not immediately connected with the administration of public justice. Occasionally exceptions arise. Thus, in 1837, a painful duty in this respect was cast upon the judges, to which I am under no necessity to make, and gladly abstain from making, further allusion. A new era has dawned upon us since; and the events of that period are now no more than matters for the historian. At a later period the public mind was much agitated by a so-called question of annexation—and that, too, has fallen into oblivion, or if remembered by those who then favoured it, it is, I apprehend, with a devout feeling of thankfulness that it has been irrevocably abandoned.

"A third exception presents itself now. No one who passes through our streets can doubt to what I allude, and few, I trust, will think that it is out of place for me to offer some observations in regard to it. It is impossible to make an inquiry of the most superficial nature into the cause of what we see around us, without having our attention forced as it were upon Ireland and its condition—and we cannot avoid looking back far beyond the events of the present time to understand the pretext out of which has arisen the crisis apparently impending.

"From the reign of the first Plantagenet—through the times of the Tudors—under the unsparing sword of Cromwell down to the culminating victory gained by William of Nassau, Ireland has been a battle field. Wars of invasion and territorial conquest—wars between the ancient races and the descendants or successors of the invaders, wars to maintain or extend the ascendancy of the crown of England, wars of dynasty—the latter more especially, though it was not confined to them, embittered or inflamed by differences of religion—successively wasted the land and prevented the prosperity arising from the cultivation of peaceful and industrial pursuits. And since then, down to a modern period—among some sources of active discontent, after breaking out in open violence—and among complaints not without reasonable foundation—the legal disqualification of men on account of their religious opinions held a prominent

place. Since the change of law in that particular, and down to the present time, a very different course of policy has been followed—having for its leading object the promotion of the material prosperity of the whole people, without reference to differences of race or of religious opinions. But during that time also, the impatient folly of some, the perverse malevolence of others, and an almost wilful blindness to the good that has been done, as well as to the promise for the future which had thus been given, has checked progress, and has, at the present, forced the adoption of repressive measures to avert from Ireland the horrors of civil warfare.

“That a conspiracy—formidable by its numbers though not extending to the classes possessed of education, intelligence or property—exists against the government of that country is now beyond doubt. That such conspiracy has been encouraged if not originated, fostered if not created, by men of Irish birth or of Irish descent resident in the United States is brought home to our conviction by the daily record of passing events; and that the inevitable result must be prejudicial to the peace and prosperity of Ireland is as obvious as the necessity for vigorous measures of repression and restraint. Nevertheless, we might, here in Canada, whilst earnestly desiring the maintenance of the established government in Ireland, and that the mad effort to dismember the United Kingdom might meet with speedy and ignominious failure, have thought themselves beyond the immediate reach of the threatened conflict. We might expect to hear its echo, but not that we should be made parties to it in our own land. For, admitting, for the argument sake, the existence of injustice and oppression which is advanced as the justification of this conspiracy—no such discontent exists or ever has existed here. Canada, among whose most valued inhabitants are many of Irish birth and descent, is no more responsible than the United States of America, in which a very large number of the Irish become domiciled, for any of the causes, real or fictitious, which are made the manifesto of these conspirators—and I firmly believe that few indeed, if even one of all the Irish residents in Canada, no matter what his creed or party, are so insensible to the advantages of our present form of government as to desire a change, least of all by armed invaders. And yet such is the danger that seems to be imminent.

“It is not war, as that term is understood in the law of nations, that threatens; war tempered by modern civilisation, by a regard to considerations of humanity, by a desire not to inflict needless suffering on the inhabitants of an invaded country. It is not even civil internal conflict arising between inhabitants of the same country and subjects of the same government, where one part of the subjects, greater or less, of some government desire to subvert it and to establish another in its place. But it is an intended invasion from a foreign country and the duties of its government, by a body of men whose acts will place them beyond the pale and protection of all national law, and who cannot therefore be expected to act in conformity therewith, or to acknowledge any of its obligations.

Their avowed motives include that of revenge upon England for the alleged wrongs of Ireland, and as they do not hope, at this moment, to raise an insurrection and strike at the Queen's government in that country, they propose to assail this province, as a means of insult and annoyance which is more within their reach, and in which they may indulge in the hope of an easier temporary success.

"Such an attack, though conceived and executed in such a spirit, would, in all human probability, be an outlet for the most fiendish passions of the most abandoned of those associated in it, where success would be accompanied by rapine and violation, by wholesale plunder and unrestrained licentiousness. When I reflect on the consequences of such an invasion I feel reluctant to believe that citizens of the United States who are unconnected with its alleged motives and excuse, are, as has been repeatedly and confidently affirmed in their own public journals, contributing their means to promote such atrocious results.

"I do not think the occasional outbursts of 'envy, hatred and all uncharitableness' with no measured mingling of falsehood and misrepresentation, which some portions of the public press display, exhibiting in the same moment the malevolence of the worst passions with the irritating consciousness of impotency to indulge them, require notice at my hand. I can understand political theorists speculating upon the superiority, in their estimation, of a republican form of government over a monarchy, and that in America at all events the one should supersede the other. I can understand that enthusiasts in favour of this theory would rejoice in any course of events which would bring about such a result, and that if their sense of national obligation restrained them from active proceeding in its support they would take no measures whatever to prevent it. But I cannot understand how any men who recognise the force of national and moral obligations can aid, whatever their abstract opinions, in sending fire and sword among a neighbouring people, to force them to change a form of government under which they are prosperous and contented, and to adopt another, against which their feelings revolt and from which they see no good reason to anticipate a larger amount of happiness or liberty.

"But if such a storm be gathering on our horizon, thank God it will not find us divided among ourselves, or unprepared to resist the invader! I can make no stronger appeal for the truth of this assertion than to the proceedings in every part of the provinces no longer ago than Saturday last. Whatever our national origin, we are all Canadians. Whatever our convictions and opinions on religious subjects, we are all equally protected in their peaceable enjoyment. Our laws recognise no immunities, privileges or distinctions, for any one class, that are not open to all. Our institutions are both in theory and practice as free as those of any nation upon earth. To a profound and zealous adherence to our constitutional rights and liberties we add a personal devotion to the Queen, honouring her as the head of our government, loving her as the mother of her people,

praying God for the prolongation of her reign, and for her domestic happiness and welfare.

"Experience has amply assured us that there is no despotism under her sceptre, while we are not equally convinced that there is as great a freedom from it and as great an actual enjoyment of more real liberty under forms of government more popular in their external character. And what stronger proof that we rightly appreciate our advantages could be given than is afforded by the events of the last week. The sounding of the alarm was instantaneously followed by the gathering of willing thousands to defend our altars and homes. The country which was, as it were, slumbering in peace, has aroused itself into activity, and presents the aspects of a vast extended camp, and while relying as heretofore on the co-operation of the mother country, the Canadian people from Sarnia to Gaspé have sprung to arms for self-defence. If forced to employ them, they will strike in a good cause, and in the humble hope of the protection of Divine Providence. There can be but one reception for the invaders—a stern and pitiless opposition to repel the aggression—striking for Queen and country, for laws and liberty, for wives and children; and may God defend our rights!"

Since writing the above, the danger which the Chief Justice in such eloquent and forcible language warned his countrymen that they must any time be prepared to meet, has really happened. The Fenians have made their attempt on Canada and have most signally failed—they found the Canadians fully prepared to defend their country, and the Governor-General has justly congratulated the colonial parliament on the unanimity and energy which has been displayed. It is true that a greater number of Fenians have succeeded in getting back to America than would have been the case if they had been opposed by regular soldiers commanded by experienced officers, but, under all the circumstances, the result has been eminently satisfactory, because, if the Fenians, on the one hand, have learnt that it is easy to effect a landing on Canadian territory on account of its long line of frontier, which must be more or less undefended, they have also found that success when there is hopeless, that it is impossible to proceed or retreat with safety, and what is more discouraging to them, perhaps, than anything, was to find that no portion of the inhabitants, in the shape of disaffected Irishmen, were ready to receive them with open arms.

In a short notice like this it would perhaps be out of place and certainly impossible to give anything like a history of what has taken place, but we cannot dismiss the subject without a word or two of praise at the way in which the Americans have behaved in the matter. During the late war in America many circumstances happened which caused a bitter feeling against this country, and the Fenian leaders thought it probable, no doubt, that the American Government would wink at, certainly take no active steps to suppress, the organisation of any piratical enterprise against Canada, but in this they were greatly mistaken. There were no belligerents, consequently no question could arise on the duties of a neutral

power, the acts therefore of the Fenians in organising on American soil this raid against a friendly power, constituted a serious offence against the municipal laws of America. Whatever the feelings of a certain class of Americans may be with regard to this country, however great their sympathy with the Fenians, it was impossible for the authorities to look on and quietly see their laws disregarded and violated. But even if it was their duty, they deserve the best thanks of this country for the prompt assistance they have given in putting down this conspiracy. It matters but little what becomes of the men whom they arrested on their return across the Canadian frontier—whether they escape, or are punished for their violation of the law—one thing we may and do thank the Fenians for, they have been the means of showing that what is right the American authorities will do, in spite of any ill feeling against this country which may exist among a certain class, and it will be a long time before Englishmen will forget how well the Americans have behaved.

TESTIMONY OF PARTIES IN CRIMINAL CASES.

The following will be interesting to Law Reformers in England. In some of the States already prisoners are admitted to give evidence in their own cases, and we are informed that the Bill enabling them to do so will undoubtedly pass in Massachusetts :—

“House of Representatives,

“April 30, 1866.

“The Committee on the Judiciary, to whom was referred the Order of the House relative to the testimony of defendants in criminal cases, beg leave, for the reasons herewith submitted, to report the accompanying Bill.

“Per order,

“JOHN Q. ADAMS.”

“*Report.*—If we assume that certainty of punishment to the guilty and assured acquittal to the falsely accused are the legitimate ends of any system of criminal law, and then consider that the knowledge necessary to guide the magistrate or the jury to a just decision can only be gained by evolving from all the evidence submitted the truth as to the question at issue, it would seem that a method of investigation which multiplied the chances of eliciting the truth and eliminated many causes of error must be looked for in a system which opens fully to the trier every source of authentic information. Such a system, it is thought, must be found in the admission of all parties to testify in their own cases, criminal as well as civil. For who can furnish evidence so material and important as to what has been done by any man as the very man himself? And it must not be forgotten that the law itself assumes that he is innocent at the very time that it now denies him the privilege of telling his own story; when, too, this very story would be the surest possible means of instructing his triers.

"If he is innocent, his full, free, frank and clear statement, unassailable by cross-examination, and according with and reconciling all the facts established by other evidence at the trial, will insure his prompt and honourable acquittal.

"But the guilty man, struggling hopelessly to tell a series of falsehoods which shall not conflict with known facts, and shall be able to endure the strain of cross-examination and comparison, will inevitably enlighten his trier as much by his lies as the innocent does by his truth.

"If, therefore, it were simply a question of theory, unembarrassed by long practice and immemorial tradition, it is doubtful if we would now initiate a system which excludes the most important witness because he may eventually be shown to have been guilty of the crime charged.

"Certainly in a matter almost identical in principle, the legislature has shown itself not disinclined to innovate wisely, and the practical results have so far confounded the predictions of those who can discover nothing but evil in any attempt to improve upon prescriptive custom, that we apprehend that the number of those is to-day quite insignificant who would repeal the recent law permitting parties in civil cases to be competent witnesses in their own causes.

"Besides these considerations, it may be urged that the only ultimate evil which can befall any man, be he never so guilty, by whatever evidence his guilt is shown, is the suffering to which, as a punishment, his answers to questions addressed to him may contribute. But if this evil is sufficient reason that such questions should not be addressed to the defendant himself, it is an equally sufficient reason for prohibiting all questions of that tendency to whomever they may be put; in other words the logical result would be impunity to all offenders.

"Now, if there were any reason to suspect that innocent men under indictment showed any propensity to subject themselves to unmerited punishment, and that this liability was stronger when they are allowed to testify in their own behalf than where the testimony comes from all other persons, particular enemies and otherwise interested persons included, the case might be different; but no such trait in human nature is known to exist.

"Nor is there any real foundation for the idea, apparently entertained by some persons, that there is any peculiar hardship in self-conviction. There is no increase of suffering to the accused in a conviction obtained by his own voluntary testimony above that incurred upon evidence from any other source. This is entirely imaginary. The only suffering is the punishment.

"And it must be remembered that such testimony can never have been excluded for the protection of the innocent, for they are precisely the persons, and the only persons, to whom such prohibition can work only evil. It is the interest and the wish of every innocent man suspected of crime to explain at once inculpatory circumstances, and from no source can such satisfactory explanations be obtained.

"If, on the other hand, this rule of exclusion was designed to save culprits from a fancied hardship of seeing themselves condemned out of their own mouths, it fails even there ; for any writing or any speech of the defendant is unscrupulously read or delivered in his hearing as evidence against him. To be sure, his words cannot be heard by his triers in their best and most trustworthy form, but reduce them to the acknowledged inferior shape of hearsay, and filter the thought through another mind, and the technical door is wide open to receive them.

"Besides this, such second-hand evidence is almost certain to be deceptively incomplete, for the reasons that the witness may not have heard correctly, may have misunderstood, may wilfully or negligently misreport, or may not clearly and distinctly recollect what was said, or may for all or any of these reasons mislead the triers as to the connection and circumstances attending the statements testified to. The only person who can complete the incompleteness, or explain the incorrectness, must now suffer in silence.

"In daily life we follow no such rule. What father so inquires into the alleged misconduct of his children, or what employer thus verifies suspicions of his agents ? Shall we be more tender of criminals, or is the homely practice inefficacious to secure the end in view, not the escape of the guilty, but the impunity of the innocent ?

"Or can any consistency be claimed for a system of law which permits a man to subject himself, not certainly to a fine of one dollar, but to a civil verdict to the extent of more than his whole property upon his own testimony, which yet obstinately excludes the same testimony if only it happens to be offered in an insignificant complaint for an assault on the other side of the same court ? In small crimes there is little controversy as to the benefits of hearing both parties. In many such cases now, the swiftest is likely to secure a fatal advantage over his less diligent but more meritorious adversary. This notoriously occurs in a good many of the small misdemeanours which fill our inferior criminal courts. It is only in the most dreadful crimes that it is deemed dangerous to admit the accused to tell his story. Here it is urged that this privilege ceases to be a permitted liberty, but turns at once to a peremptory requirement upon the murderer to speak out or stand convicted by his own silence ; and those who feel great weight in this dilemma, endeavour to mitigate its apparent asperity by suggesting that the man's muteness shall not be urged against him to the jury. Such a provision must prove futile and is unphilosophical, for no human power can prevent the jury from drawing their own inference from this act of the prisoner, fasten as you may the lips of the prosecuting officer.

"And why should this single act be withdrawn from the jury, even if it could be ? May you not now show every act of the prisoner, from the time of the alleged crime and before it, and urge that the natural inference from each or any is the guilt of the man who under the circumstances would act as he acted ? And can the deduction which you would urge have any other ultimate foundation

than the collective experience of human nature in all time, teaching every man of common sense that under given circumstances, in a vast majority of cases, an innocent man acts in one way and a guilty man in quite a different way ?

"Why is the voluntary silence of a man labouring under a grievous suspicion assumed by all men to be evidence of guilt ? Simply, because the invariable experience of mankind has demonstrated that the innocent hastens to tell his story, conscious that in full disclosure is his defence. Why should not this necessary inference of universal experience, springing from the very nature of man, be used against the guilty who dares not trust to a tissue of lies, and will not tell the truth ? Does it bear hard upon the guilty ? In what way ? Nay, even if it did so, wherefore not ? Is criminal law intended to relieve the guilty ? Is not the sure conviction of crime desired ?

"Why not extort it from the guilty, if in so doing you use no greater force than affording him an opportunity to tell the truth if he can, or a lie if he dare ?

"If finally it be said that we are encouraging perjury, it must be retorted that if it be indeed so, the argument if allowed must prove as fatal to the evidence of parties in civil cases as it is here, but we do not there admit its sufficiency, nor should we here, and by a parity of reasoning. And whom in any case can we tempt to perjury ? Not surely the falsely accused, for the truth is his deliverance. It is only the guilty whom we are asked to spare this temptation, and that too, when this very tenderness for guilt must prove injustice to innocence.

"These views are submitted for the consideration of the House by the Committee, although they are not fully concurred in by every member, nor is the Act herewith submitted to be considered as a measure commanding the unanimous support of the Committee; but they would heartily commend to the very careful attention of the House the very able letter appended from Chief Justice John Appleton, of the State of Maine, by whose influence and exertions, a law precisely like the Act now presented was enacted in that State, in March 1864, and is still in full force to the general acceptance of the people. The Committee would also refer those interested in the question to an able report of the Senate Committee of the legislature of 1865, upon the subject, with the instructive letter published therewith, which may be found in Senate Documents for 1865, No. 195."

"Bangor, February 24, 1866."

"MY DEAR SIR,

"I received a few days ago a note from my friend, Governor Cony, advising me that you were desirous of ascertaining the practical working of the change in the law of evidence recently adopted in this State, by which the accused in criminal trials are, at their own instance, made witnesses.

"The opinions of individuals on this subject will be more or less influenced by their preconceived views as to the wisdom and expe-

diency of the proposed change. I had no doubt that the interests of justice required that it should be made, and so far as I had any influence, freely used it in favour of its adoption. Nothing has since occurred to change or even weaken my previous opinions. I have tried criminal cases in which the accused being innocent owed his honourable acquittal in no slight degree to his own testimony, and the clear and frank manner in which it was delivered. In one case, notwithstanding the innocence of the prisoner, as was subsequently most abundantly established, and notwithstanding his own testimony, the jury found him guilty. So being guilty and yet testifying to his own innocence, the jury in some cases have justly convicted, and in others have erroneously acquitted the prisoner.

"But erroneous verdicts will occasionally be rendered, whether the accused are admitted to testify or not, as long as juries shall be composed of fallible men. No rules of admission or exclusion of evidence can be established which will prevent misdecision. The results may not vary in many cases, whether the prisoner is received or rejected as a witness, but in all trials there will be a greater assurance of correct decision and a greater confidence that justice has been done, than where evidence, and that perhaps of the greatest importance, has been withheld.

"But the expediency of the law in question cannot be determined by the results of particular cases. It cannot depend on the opinions of individuals. It must rest upon the general reasoning applicable to the subject. All judicial decisions should be based upon evidence. All the evidence attainable and needed for a full understanding of the case should be forthcoming, unless the evils of delay, vexation and expense consequent upon its procurement should exceed those arising from possible misdecision.

"The exclusion of evidence is the exclusion of the means of correct decision. The greater the mass of evidence excluded, the less the chances of such decision, until, if all evidence be excluded, resort must be had only to lot.

"It is but a few years since the most strenuous opposition was made to those changes in the law of evidence, by which, in civil cases, parties and those interested in the result have become admissible witnesses. Those changes, when proposed, struck with horror that class of minds whose conservatism consists in the love of abuses and in the hatred of their reformation ; a love and a hatred the more intense in proportion to the atrocity of the abuses existing, and of which the reform was attempted.

"These changes have been made, and being made have received the general approbation of the entire judicial body in England ; in this country with hardly an exception. Indeed, the wonder now is how any one ever could expect justice would be done when the very material—*pabulum justitiæ*, as Lord Bacon terms it—was withheld from those whose duty it was to decide.

"The propriety of admitting parties being conceded, the question naturally occurs, Why should they not be received in criminal as in civil cases ? The object in all trials is the same—the ascertainment

of the truth. The greater the evils of misdecision in criminal than in civil cases, the greater the necessity of resorting to all available sources of information for the purpose of averting those evils.

"The truth is wanted from any and every source. The prisoner knows it. The law presumes him innocent. If regard be had to the legal presumption applicable to each and every prisoner, he should, being presumed innocent, be received to testify. Being innocent, he would not resort to falsehood to establish such innocence. Being innocent, and no other evidence of such innocence being attainable from any source, his exclusion is the exclusion of all possible means on his part of making out his defence. Being innocent, and other proof of the fact attainable, who does not perceive the importance of his evidence to explain all doubtful circumstances, so that he may not only be acquitted, but that the acquittal shall leave no stain behind?

"Of all exclusions, that of a man presumed innocent would seem to be the most monstrous. Is he innocent, and shall he not be heard to establish his own innocence? Every motive, if innocent, is adverse to falsehood.

"Is he guilty? His guilt is not proved. It may be that he is, but it is not to be assumed in advance, and the assumption made the ground of exclusion—an assumption at variance with legal presumptions.

"If guilty, and he is a witness at his own instance, the objection will be made that receiving his testimony may lead to perjury. But the essential sin of perjury is the falsehood uttered, aggravated more or less by the occasion of its utterance.

"The prisoner being guilty pleads not guilty. In so doing he utters a lie, just as much as when he makes a false answer as to any other fact about which he is interrogated. The prisoner being a witness, denies in detail what before he had denied in the gross. In the one case, it is a lie without, in the other it is a lie with circumstances. It is idle to say that the falsehood in its generality is not equally a lie as when it is compounded of many particulars.

"True, in the one case the prisoner is under oath, in the other he is not. But the falsehood is the essential sin, and it exists as much in the one case as in the other. The superadded ceremony may affect the legal, but it cannot the moral character of the falsehood.

"The obligation to utter the truth is of universal application. Undoubtedly the prisoner being guilty cannot defend without the utterance of a lie; but if he cannot, it may be a very good reason why he should not make the attempt, but a very poor one why he should lie. No one who would not deprive a prisoner of the right of self-defence even by uttering a falsehood by way of plea, can consistently object to giving him the right of denying, explaining, or qualifying the charge as a witness.

"The prisoner guilty, upon examination and cross-examination, may utter the truth. If so, justice is done. The great object of judicial proceedings is accomplished.

"Suppose the prisoner answers falsely, it by no means follows

that his false answers will be credited. But the possibility of false testimony is no reason for exclusion. To exclude a witness because he may lie is to exclude all witnesses, because there is no one of whom the truth can be predicated with assured certainty against the pressure of all conceivable motives acting in a sinister direction. The exclusion pre-supposes guilt which the law does not presume—and probable perjury to sustain such guilt—two crimes: one committed, the other to be committed by the very person whom the same law presumes guilty of no crime whatever.

“To exclude for presumed guilt is to determine in advance and before hearing and adversely to the prisoner, the question in issue. It is, when the question of guilt or innocence is on trial, to exclude for guilt before guilt is or can be ascertained. The presumption of innocence logically requires the admission of the innocent.

“But guilt is no ground of exclusion. The law admits the avowed accomplice, expecting a pardon, his pardon dependent upon the delivery of inculpatory evidence against the prisoner, whose innocence is a presumption of law. Admitted guilt received and heard; presumed innocence refused a hearing. Crime then constitutes no reason for the exclusion of a witness. The real ground of exclusion is that he is a party to the record. So that the participant in crime is heard, while the presumed innocent party to the record is rejected, and for that reason alone. But the mere fact that a man's name is on the docket of a court, is no very good reason why his testimony, when required for the purposes of justice, should for such cause be rejected. In civil cases it has been deemed insufficient, much more should it be in criminal cases.

“So, too, the law looks with great suspicion upon hearsay evidence. In the case of hearsay, whether confessional or other, there are at least two, and there may be more witnesses whose conjoint testimony, original or reported, serves as the foundation of judicial decision. When the percipient and narrating witness are united in one and the same person, if he speaks the truth, and be believed, he determines the cause; in hearsay the narrating witness is not the percipient or affected witness; he speaks or purports to speak from the narration of others, and those others are the efficient witnesses. When the alleged confessions of a prisoner are received, the efficient testimony consists in the statements thus reported. But these confessions may have been misunderstood in whole or in part from inattention; mis-recollected from forgetfulness, or mis-reported from design. They may be indistinct and incomplete, embracing but a portion of the truth—and the omissions which interrogation would have supplied, may produce the sinister effect of falsehood. The sanction of an oath and the securities to trustworthiness afforded by examination and cross-examination are wanting. Yet this very evidence thus seen to be inferior in trustworthiness is received, while the party present in court is not permitted to correct the errors of the narrating witness, whether arising from inattention, mis-recollection or design, nor if the confessions were indistinct or incomplete, to supply the deficiencies arising from such indistinctness or incom-

pleteness, and that, too, when under oath and subject to examination and cross-examination.

“The securities against testimonial falsehood are the sanctions of religion, examination and cross-examination, and the fear of temporal punishment. These are all wanting in confessions, as against the person whose confessions are offered to his prejudice. They are attainable and attained in all their strength, if the prisoner is examined.

“The result is, that the prisoner would be a witness in both cases. In the one case without any of the securities for testimonial trustworthiness, he testifies through the lips of the narrating witness, by whom his confessional utterances are reported. In the other case, when his testimony would be delivered under all the recognised safeguards against falsehood, it is rejected. Without any securities against falsehood, incompleteness, or indistinctness, the party is a witness; with every one attainable in their utmost efficiency he is excluded. Testimony recognised as inferior in every essential of trustworthiness is received, while the best evidence—the direct statements of the party under oath and subject to examination and cross-examination, are rejected.

“The accused may lie and the jury may be deceived thereby. While there is no witness whose statements may not be false, so there is no witness to whose statements, true or false, it can be made certain in advance that the just degree of credence will be given by the jury.

“But what is the danger of deception? The prisoner is a witness at his own instance. Does he answer evasively or, being cross-examined, does he refuse to answer? Silence may be equivalent to confession; evasion indicates that a true answer would endanger the person interrogated. Is the witness false in all his statements? Each particular falsehood endangers; the more numerous the falsehoods, the greater the chance of detection and disproof. The answer partly true and partly false? Each truth is in eternal warfare with the accompanying lie. Truth and falsehood have no greater fellowship than has new wine with old bottles. The truth uttered by the witness imperils the lie. Every truth he utters endangers himself. Every truth uttered by another, every true witness, increases his peril. The refusal to answer, the evasive, the false answer, the not less significant and expressive silence, are each and all circumstances of no slight force in leading the minds of those who are called upon to decide to a right conclusion.

“The jury may, undoubtedly, place too great reliance upon the testimony of the prisoner, as they may upon that of any other witness. They are deemed competent to weigh and compare the various witnesses for and against the prisoner. Are they any the less competent to weigh his? Does his position add to his credibility? Are the circumstances which surround him such as to induce undue credence? Competent to weigh the testimony of parties in all civil cases, does that competency vanish when the prisoner on trial is called from the criminal bar to the witness stand?

The appearance and manner of the prisoner, the probability of his statements, whether contradictory or contradicted, are all open to the consideration of the jury, and they are as competent to form a correct estimate of his testimony as of any other witness.

"Hearing cases by the halves is but a bad way of getting at the truth. To receive the prosecutor and reject the prosecuted, to hear the accuser and refuse to hear the accused, would undoubtedly tend much to facilitate decision and relieve the judge of fact, of the difficulty of weighing and comparing conflicting testimony. Still greater would be the relief from labour and responsibility if no evidence was heard and resort was had to the aleatory chances of the dice. This aleatory mode of deciding cases seems to have tickled the fancy of Rabelais, according to whom Mr. Justice Bridlegoose resorted to chance, "giving out sentence in favour of him unto whom hath befallen the best chance of the dice." But it is hardly worth the while accurately to adjust and carefully to determine the relative merits of trying cases by halves, and of deciding them by the throwing of dice.

"In my judgment, the interests of justice require the admission of the party alike in criminal as in civil cases. The acquittal of innocence is thereby more probable, the conviction of guilt more assured. The prisoner, if innocent, will regard the privilege of testifying as a boon justly conceded. If guilty, it is optional with the accused to testify or not, and he cannot complain of the election he may make. If he does not avail himself of the privilege of explanation, it is his fault, if by his own act he has placed himself in such a situation that he prefers any inferences which may be drawn from his refusal to testify, to those which must be drawn from his testimony if delivered. If he testifies, and truly, justice is done. If falsely, and justice is done, however much he may complain, the public will little heed his regrets.

"I have hastily called your attention to some of the considerations bearing on this question. They will be found most elaborately examined in the masterly work of Bentham on the law of evidence, where the reasons for the proposed change are stated with a cogency of argumentation unanswered and unanswerable.

"I am, with great consideration,

"Yours most truly,

"JOHN APPLETON.

"John Q. Adams, Esq.,

"House of Representatives, Boston."

TRIAL BY JURY.

We extract the following interesting letter from *The Working Man* of July 21:—

"SIR,—Permit me to express the pleasure with which I see in the last number of the *Working Man* that prizes are offered for the best essays on a subject time-honoured, world-renowned—Trial by Jury. I rejoice also that the importance of 'amending' this famous

mainspring of our Constitution is placed side by side with the importance of 'preserving' it. Its enemies have long had their eyes open, while its friends seem to have had theirs shut, to the fact that in this, as in everything, neglect leads towards destruction. Very eloquently does Mr. Stuart Mill remind us that the 'deep slumber of a decided opinion' has oftentimes cost a nation its best liberties; and most of us are familiar with Burke's famous sentence, 'It is better to be roused by a fire-bell from our sleep, than burnt in the flames in our beds.'

"Therefore it is that I welcome rather than fear the unflattering remarks recently lavished on this institution, trusting that they may rouse us from our trance. And pleasant is it to behold, as one of the first effects of this wakening, the working man take his place in the long array of English worthies who, from age to age, as judges or jurors, speakers or writers, have manfully maintained and eloquently defended the noblest heritage of Englishmen. Did I not know how valuable is your space, I would venture to quote a few passages from Coke and Blackstone, Erskine and Fox, Bentham and Romilly, Russell and Coleridge, Hallam and Forsyth, Maurice and Mill, Lyndhurst and Brougham, Campbell and Cranworth, Pollock and Chelmsford—among many others—proving the incalculable advantages resulting from trial by jury—politically, socially, morally. It is, say they, 'the nursery of civil freedom;' 'the best school of education for the people;' 'the safeguard of judicial purity;' 'the security of all our other liberties;' 'the most perfect means ever devised for the ascertainment of truth.' They tell us how it elevates the whole tone of national character, giving men an attachment to the laws which they share in administering; removing them from the petty sphere of personal interests; enlarging their intellects; sharpening their perceptions; placing them on the seat of justice as arbitrators between their fellow-citizens, in the daily struggle of freedom against oppression, truth against falsehood, right against wrong. Were such information diffused—and the Prize Essays seem admirably adapted for this purpose—we should hear less frequently of juries 'shirking their work.' They would better discharge the obligations of their office did they learn to appreciate its responsibilities and privileges; and such is my faith in my countrymen, that I verily believe, if they will only pause to consider it as a paramount duty a sacred trust, for the discharge of which they are answerable to God and their fellow-citizens, they will bear their part right willingly and well. That a few childish irrational defects in the details of the system should be permitted to throw a doubt on the nobility and beneficence of its principle, is scarcely more astounding than that they should be suffered to exist for another day. I shall look out for some practical suggestions from the *Working Man*, feeling convinced they will afford that element which Lord Cranworth well observes, 'the presence of a jury always adds to the court good common sense.'

"Only two remarks more. 1st. Will not the 'womankind' help also? Let every wife and mother, sister and daughter, during the

next few assize weeks, send forth the juryman of her household as a volunteer to his post, leading him to esteem his office an honour, and the cause in which he serves his country. Let her, meanwhile, with redoubled zeal, share his burdens at home and take his place. Thus united in a noble patriotism, I venture to say every such household will be blessed, every such juryman be no loser, while his country and posterity, through his loyal service, will be many hundred times the gainer. 2nd. Will not the whole legal profession, from the bench downward, strive at once to redeem the character of an institution of which they have oftentimes been the noblest supporters, and show righteous consideration for the souls and bodies of their fellow-workers, the 'non-official judges?' If so, the jurors will have to thank the *Working Man*, and, as true kindness is ever reciprocal, he to thank them. A JURYMAN'S DAUGHTER."

THE LEGITIMACY DECLARATION BILL.

We regret to find that this measure has been postponed to the ensuing session of Parliament, but we are glad to see it is then to be re-introduced. That a Bill standing for second reading on the 18th of July, should fall a victim to the "lateness of the session" cannot be a matter of astonishment; but that it should have to be abandoned in consequence of the "unexpected defection of a coadjutor," or, to quote Mr. Chambers himself, "because, to his surprise, he found the honourable and learned member for Ayr (Mr. Craufurd), although his name was on the back of the Bill, had changed his mind, and intended to oppose the measure"—this certainly carries us out of the region of commonplace, and demands a somewhat fuller explanation than the public have yet received. Let us endeavour to bring into one focus the few broken lights already available to us.

By reference to the Minutes of the House, to contemporary journals, and to the Bill itself, we learn that it was "presented by Mr. Chambers and Mr. Edward Craufurd" (their names being on its back), on March 6, and ordered to be printed; that it was in members' hands by the 14th, and stood for "second reading on the 19th March." The following day, March 20, the papers announced that the Bill had been postponed to the 23rd, and up to April 10, it continued to be "moved on" about twice a week. Our contemporaries called attention to the importance of the measure, and to the existence of a private cabal against it that threatened to become a public scandal. From April 10, the Bill was again postponed to June 4, the pretext being that, by some fatality, it always gravitated towards two o'clock in the morning, when its friends were naturally anxious to get home. Finally it was fixed for July 18, on the ground that this would give it a good chance of a favourable discussion. The result is before us. When that morning came—it was a Wednesday early sitting—it was evident from the state of public business that the Bill had no chance of passing in time to become law this year. Accordingly it was withdrawn. Mr. Chambers

stated that the Bill was intended to remove an ambiguity which it had never occurred to members of either House of Parliament, during the carriage of the original Act, in 1858, could arise as to the right of any of the parties to demand a trial by jury under it in disputed questions of legitimacy; that no doubt ought ever to have been entertained on the subject; that the Law Amendment Society, which prepared and carried the original Bill, in 1858, and now introduced the present explanatory Bill, had never for a moment intended that a jury trial should be able to be withheld under the Legitimacy Declaration Act; that he believed the whole profession were in favour of the Bill; that the deepest interest was felt by the public in its success, as evinced by numerous and influential petitions from the manufacturing districts, the City of London, the Incorporated Law Society, and other public bodies, and that he should reintroduce it early next session; that this was not the place to discuss or explain its merits, and he had only made these remarks, finding that his honourable and learned friend who had put his name and kept his name on the Bill, intended ("acting under some inexplicable pressure") to inform the House how very much he was averse to it. Then the honourable and learned member for Ayr rose and stated that he had entirely misapprehended the Bill; that he had fancied it was enactive and not declaratory; and that he had told Mr. Chambers, again and again, it ought to be the former and not the latter; he explained his reasons, and then wound up by stating that in his opinion now it ought neither to be the one nor the other. He did not say at what time he had made the first discovery, nor by what chain of reasoning he had arrived at the last conclusion, and convinced himself that questions of fact between subject and Crown, the settlement of which would determine, conclusively and for ever, all claims to lands, honours, and every right dependent on lawful birth and British character, ought to be settled without either petitioner or respondent having the power, then or at any future time, of submitting his rights to a jury. It is very certain that the honourable and learned member was in his place so long ago as the 19th of March, when the House was prepared to discuss the Bill. Can it be supposed that one of its ostensible promoters had not then read its single clause or come to comprehend it? This, at any rate, is certain—by keeping his name on the Bill for five months, the honourable member was enabled to maintain a power over it, which no opponent should possess; to prevent a supporter of the measure taking his place; and finally to have the opportunity of presenting to the House one side only of the question—that side being in direct contradiction to the Bill itself!

It is not a pleasant task to relate this singular story. We do so only in the highest interests of society. A mistake might occur and even be unperceived for a few days—but that a Bill should continue from March to July to be endorsed with the name of an uncompromising (or as Mr. Craufurd terms himself, a "consistent") opponent, that he should continue to give it outward sanction, while he avowed he had been engaged all the time in endeavouring to

set his colleague and others against it, is an unexampled occurrence.

In regard to the Bill itself, we shall take another opportunity of discussing it. It may be sufficient to say, the Law Amendment Society, by whom the original Act was framed in 1858, and who have now introduced this Bill to explain it; the law officers of the Crown who carried it through the House of Commons; Lord Lyndhurst and Lord Brougham who carried it through the House of Lords—have one and all expressed their surprise at hearing that it could be so construed as to render the right to demand a jury doubtful; and the present learned judge of the Divorce Court, and many other eminent jurists and statesmen are, we understand, of the same opinion. We trust that the attention of our legislators will be turned towards the subject during the recess, and that they will do their utmost, both as to this Bill and other Bills, to preserve inviolate the right of the subject to the old Constitutional mode of trial, in questions of such a nature as those involved under the Act of 1858.

To one other point also we beg their attention. The Incorporated Law Society close their petition in favour of the Bill, with the following important sentence:—"And your petitioners humbly submit that parties, whether petitioners or respondents, in any proceedings under the said Acts, or either of them, should be relieved from the expense and delay attendant on appeals to the House of Lords, on the interpretation of the language of the legislature in Acts of Parliament."

This raises a very important public question. A Declaratory Bill, as our legislators often seem to forget, leaves the existing law just where it is; but it puts an end to doubtful constructions, and lessens the chances of clashing and erroneous opinions or decisions. Why should suitors be driven from court to court to find out what the legislature really intended to do, or did? We cannot but hope the following session may bring forth a short Bill, enacting that whenever an Act of Parliament is found capable of bearing two contradictory meanings, such doubts being fairly raised by competent persons, the legislature will forthwith put their real meaning and intention into English that shall be unmistakable, and pending as well as future causes have the benefit of a right construction. We then shall, probably, at last have our Acts properly drawn in the first instance.

SOCIAL SCIENCE ASSOCIATION.

The Annual Meeting of the Jurisprudence Department of this Association took place on Monday, June 18, Lord Brougham in the chair, at which the Report of the Standing Committee on the proceedings during the year was read. The business of the session principally referred to was a Digest of Case Law—which had formed the subject of a deputation to Earl Russell—the Bankruptcy Law—concerning the amendment of which the Attorney-General had been waited on—and the Patent Law.

The Annual Dinner of the Department took place at the "Ship," Greenwich, on Saturday, July 7, Lord Brougham again taking the chair. His lordship was supported by Sir John Pakington, Bart., M.P., Rt. Hon. Joseph Napier, W. Ewart, Esq. M.P., W. M. Marsh, Esq., M.P., Sir Villiers Surtees, Sir J. Eardley Wilmot, Bart., Edwin Chadwick, Esq., C.B., Mr. Serjeant Burke, Mr. Serjeant Parry, Mr. Daniel, Q.C., Mr. Macqueen, Q.C., Mr. Joshua Williams, Q.C., Dr. Waddilove, Mr. Hastings, &c.

The following questions have been selected for discussion in the Department of Jurisprudence, at the Annual Meeting of the whole Association at Manchester, on the 3rd of October next :—

Section A.—International Law.

1. What are the best means of extending and securing an international law of copyright ?
2. What is the duty of the mother country as regards the protection of inferior races in her colonies and dependencies ?
3. How may the extradition of criminals be best secured, consistent with the right of asylum ?

Section B.—Municipal Law.

1. On what principle should a bankrupt law be founded ?
2. What would be the best mode of reducing the law of England to a compendious form ?
3. What conditions or limitations ought to be imposed upon the power of disposing in perpetuity of property, real or personal, for charitable or other public purposes ?

Section C.—Repression of Crime.

1. Is it desirable to carry out life sentences to the utmost ? and if so, in what cases, and under what form of discipline ?
2. What are the best means of preventing infanticide ?
3. In what other public institutions besides gaols is it expedient that coroners should be required to hold inquests in all cases of death ?

RETIREMENT OF LORD CHIEF JUSTICE LEFROY.

At the Antrim Assizes, at which the Chief Justice of the Queen's Bench presided, when the grand jury had disposed of their business, the High Sheriff read the following address, which had been previously agreed on by that body :—

"To the Right Hon. Thomas Lefroy, Lord Chief Justice of the Queen's Bench.

"We the High Sheriff and grand jurors of the county of Meath, assembled at the Summer Assizes, 1866, cannot allow the last occasion of your presiding at our assizes to pass without expressing our regret at the termination of the long and useful public career which now draws to a close, and our gratitude for the able and kind manner in which you have ever assisted us in the discharge of our duties. We now hope that after so many years of exertion your life may yet be prolonged in the quiet of your family and the society of those

chosen friends to whom your personal qualities have so much endeared you."

His lordship, who seemed deeply affected, replied as follows:—

"Gentlemen of the Grand Jury,—Such an address from those who have had an opportunity of forming the opinion they have so kindly expressed—such an opinion from the grand jury must at all times be grateful to the feelings of any judge. I do not disguise or conceal from you that at the present moment it comes to my feelings as peculiarly grateful. I shall say nothing further than that I hope you will not consider me in any way deficient in gratitude if I do not, from any defect of powers, express myself adequately in reply to the testimonial you have graciously presented to me as to the discharge of my duties during the long time you have had an opportunity of forming an opinion on the subject. While it shall please Providence to spare my life I shall ever remember with satisfaction the intercourse I have had with this county, and the unvarying kindness and effective discharge of their duties which I have always witnessed among the grand jurors of this county. Farewell, gentlemen, farewell."

MIDDLE TEMPLE.

The treasures of art belonging to this Society have just had an important addition made to their number in the shape of a marble bust by Mr. Morton Edwards, of London, of the Prince of Wales, who is one of the benchers, which has been presented to the Society by one of the members, Mr. R. H. W. Ingram, of Titsworth House, Slough, Bucks. His royal highness honoured the artist, Mr. Edwards, with several sittings for the work, and it is executed in a manner which reflects great credit on the skill and taste of Mr. Edwards. The bust, which is an exceedingly good likeness, is draped, and has been placed on a handsome verd antique column in the library of the Society, which his royal highness inaugurated in October, 1861. We understand it is also intended to place in the library a full length state portrait of his royal highness, for which a fund has been subscribed exclusively by the members of the Middle Temple.

THE LATE SIR ANTHONY BULLER.

We regret to record the death of Sir Anthony Buller, Knight, of Pound, in the county of Devon, at the advanced age of 86. Sir Anthony was one of the sons of the late John Buller, Esq., of Morval, and uncle to Sir Arthur William Buller (also a retired Indian judge), M.P. for Liskeard. He was called to the Bar by the Honourable Society of Lincoln's Inn in 1803, and was appointed (in 1815) Judge of the Supreme Court at Madras, on which occasion he received the honour of knighthood. He was transferred to Bengal, in 1816, where he remained till 1825, when he retired.

THE LATE MR. BENDLE OF CARLISLE.

We regret to record the death, on Tuesday, June 12, of Mr. William Bendle, solicitor, of Carlisle, who, for about half a century, was a

prominent, well-known, and much-respected practitioner of that town. Nearly sixty years ago, a smart lad of fourteen or fifteen, he entered the office of the late Mr. Richard Law, solicitor, to whom he was soon afterwards articulated, and by whom, after having passed the usual examination, he was taken into partnership, and to whose business he eventually succeeded. His many fine qualities of head and heart soon gained him friends, chiefly among that devoted band who were struggling against the exclusive and pernicious system which was effectually broken down by the passing of the Reform Bill; and on the passing of the Municipal Reform Act he was elected a member of the Town Council, where he retained a seat till his death, always maintaining the character of a consistent Liberal, and a warm advocate of public progress. Twice he had the honour of being elected Mayor, first in 1844 and again in 1859, and it may be added that, strong as were his political feelings and party attachments, a more popular chief magistrate perhaps never occupied the civic chair. It has fallen to the lot of few men indeed to be more widely known, and perhaps to none to be more thoroughly beloved. In official and social life he recognised no distinction of party, and it was not the least pleasing trait of his character that when once a controversy, however sharp—and controversies used to be both sharp and personal in former days—was over he was the first to shake hands with his opponents and cast by-gone differences into the shade. He had witnessed more than two generations grow up around him in his native city, and in his latter days most of his early friends and associates had completed the span of their earthly existence. But bereavements of this kind lessened in no sensible degree the circle of his friends. With him the old generation seemed to revive in the new, and the glow of former friendship to be restored in the presence of those who bore the names of, or could trace a connexion with, his early associates. He had a cheerful smile, a cordial grasp of the hand, a genial word for all he came in contact with, and there are few whose loss will be more generally and more sincerely deplored.

EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

Easter Term, 1866.

At the Final Examination of Candidates for Admission on the Roll of Attorneys and Solicitors of the Superior Courts, the Examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction :—Arthur Alliot Wells, LL.B., John Wesley Woolsey, Edmund John Thomas Judge Mourilyan, Richardson Peele, John Cullimore, George Stevenson Lawson, and Walter Edward Moore.

The Council of the Incorporated Law Society have accordingly awarded the following Prizes of Books :—To Mr. Wells, the Prize of the Honourable Society of Clifford's Inn ; Mr. Woolsey, Mr. Mourilyan, Mr. Peele, Mr. Cullimore, Mr. Lawson, and Mr. Moore, each one of the Prizes of the Incorporated Law Society.

The following Candidates, under the age of 26, passed Examinations which entitle them to commendation :—J. Croft Deverell, B.A., James Kershaw, and Louis P. Vincent. The Council have accordingly awarded them Certificates of Merit.

The answers of Harry Samuel Williams, M.A., were highly satisfactory, and would have entitled him to a prize if he had not been above the age of 26.

The number of Candidates examined was 88 ; passed, 78 ; postponed, 10.

Trinity Term.

At the final Examination of Candidates in this Term, the following were recommended under the age of 26 as being entitled to honorary distinction :—John Richard Collins, Frederick Nalder, Francis Henry Phillips, and Frederick King Frost.

The Council of the Incorporated Law Society have accordingly awarded the following Prizes of Books :—To Mr. Collins, the Prize of the Honourable Society of Clifford's Inn ; Mr. Nalder, Mr. Phillips, and Mr. Frost, one of the Prizes of the Incorporated Law Society.

The Examiners have also certified that the following Candidates, under the age of 26, passed examinations which entitle them to commendation :—Edward Montague Browne, Thomas Mountain, Albert Edward Scott, and Julius Henry Smith. The Council have accordingly awarded them Certificates of Merit.

The Examiners have farther announced to Charles Scott, B.A., that his answers to the questions at the Examination were highly satisfactory, and would have entitled him to a prize if he had not been above the age of 26.

Number of Candidates examined, 134 ; passed, 111 ; postponed, 23.

TIMPRON MARTIN PRIZE.

Final Examination.—The Examiners also reported to the Council that, among the Candidates from Liverpool in the year 1865, Mr. John Daniel Banks passed the best Examination, and was in their opinion entitled to honorary distinction.

The Council therefore awarded to Mr. Banks the Prize, consisting of a Gold Medal, founded by Mr. Timpron Martin, of Liverpool.

INTERMEDIATE EXAMINATION.

Under 23 & 24 Vict., c. 127, s. 9.

The elementary works, in addition to book-keeping (mercantile), selected for the intermediate examination of persons under articles of clerkship executed after Jan. 1, 1861, for the year 1867, are :

Williams on the Principles of the Law of Real Property. 7th edit. 1865.

Chitty on Contracts, chaps. 1 and 3, with the exception, in chap. 3, of sect. 1 relating to Contracts respecting Real Property. Any edition published in or after 1850.

The examiners deal with the subject of mercantile book-keeping generally, and do not in their questions confine themselves to any particular system. Candidates are not examined in the method of book-keeping by double entry.

Candidates are required by the judges' orders to give to the Incorporated Law Society one calendar month's notice before the commencement of the term in which they desire to be examined. Candidates are also required to leave their articles of clerkship and assignments (if any), duly stamped and registered, seven clear days before the commencement of such term, together with answers to the questions as to due service and conduct up to that time.

Candidates may be examined either in the term in which one half of their term of service will expire, or in one of the two terms next before, or one of the two terms next after one half of the term of service under their articles.

The examinations are held in the hall of the Incorporated Law Society, Chancery Lane, London, in Hilary, Easter, Trinity, and Michaelmas Terms.

Law Society's Hall, Chancery Lane, London ; July, 1866.

BAR EXAMINATIONS.

At the recent examinations preliminary to calls to the Bar twelve gentlemen passed :—The Council of Legal Education awarded to Mr. Alfred Claribeux Curlew, student of Lincoln's Inn, a scholarship of 50 guineas per annum for three years ; and Mr. Edwyn Jones, student of Gray's Inn, a scholarship of 25 guineas per annum for three years. The other gentlemen who passed were :—Mr. Cave Stephen, student of Lincoln's Inn ; Mr. John Francis Popham, student of Middle Temple ; Mr. Thomas Lean Wilkinson, student of Inner Temple ; Mr. George Henry Maxwell Batten, student of Inner Temple ; Mr. Henry Meredyth Plouden, student of Lincoln's Inn ; Mr. John Donaldson Reeves, student of Lincoln's Inn ; Mr. Arthur Philips, student of Middle Temple ; Mr. Edward Joseph G. Dawson, student of Middle Temple ; Mr. W. Ogilvie Law, student of Middle Temple ; Mr. Henry Blake Goodall, student of Gray's Inn.

CALLS TO THE BAR.

Easter Term.

INNER TEMPLE.—Nathaniel Nathan, Esq., certificate of honour ; Phillip Kent, Esq. ; T. Witter Jackson, Esq. ; H. Scott Gresley, Esq. ;

Henry Smith Wright, Esq.; Henry Thomas Gillson, Esq.; Edward Ferdinand Pellew, Esq.; Henry Hardcastle, Esq.; Charles George Milnes Gaskell, Esq.; Reginald Dickinson, Esq.; Louis Diston Powles, Esq.; B. M. M. Ranking, Esq.; William Driffield, Esq.; Richard Corney Grain, Esq.; E. Wollaston Stanton, Esq.; and Henry Rudd, Esq.

MIDDLE TEMPLE.—J. Watton Teevan, Esq.; Denis Maurice O'Connor, Esq.; David Louis Landale, Esq.; S. Butler Provis, Esq.; John Edge, Esq.; A. E. De Lapeyre, Esq.; John Lascelles, Esq.; C. Wentworth Dilke, Esq.; W. Marsh Harvey, Esq.; John Dickin-son, Esq.; Ambrose Sutton, Esq.; J. W. Lowthorpe Green, Esq.; and H. Eugene Desmarais, Esq.

LINCOLN'S INN.—Charles Meeking, jun., Esq.; Conrad G. Howell, Esq.; Marcus Martin, jun., Esq.; G. C. Price, Esq.; William H. Allcard, Esq.; J. A. Willis, Esq.; A. R. Kirby, Esq.; J. Davis Davonport, Esq.; John Batten, jun., Esq.; and W. George Tanner, Esq.

GRAY'S INN.—J. Sheppard Scott, Esq.

Trinity Term.

INNER TEMPLE.—J. Siddall Wood, Esq.; Frederick Boyle, Esq.; W. Wheeler Smith, Esq.; Henry F. Thurlow, Esq.; V. Kirk Armitage, Esq.; J. Carrington Ley, Esq.; J. Burnett Box, Esq.; A. Trevor Jebb, Esq.; E. Louis Bateman, Esq.; T. Humphrey Moseley, Esq.; Frederick Gray, Esq.; J. Douglas Finny, Esq.; R. Grant Suttie, Esq.; William Duncan, Esq.; G. Frederick Chambers, Esq.; E. W. Hollond, Esq.; Nicholas J. Hannen, Esq.; and J. Marcus Joseph, Esq.

MIDDLE TEMPLE.—J. E. G. Dawson, Esq.; Conrad Hume Pinches, Esq.; Henry Dolm, Esq.; Theodore Thomas, Esq.; Charles T. Browne, Esq.; Francis W. Gardner, Esq.; J. Firth Bottomley, Esq.; Charles Miller, Esq.; Albert Birmingham Miller, Esq.; George Hollings, Esq.; H. Wildey Wright, Esq.; Paynton Pigott, Esq.; R. Chester Fisher, Esq.; Stansbey H. Pigott, Esq.; William Griffiths, Esq.; Ralph Heap, Esq.; W. Buche Powers, Esq.; E. Bennett, Esq.; David Brandon, Esq.; Septimus Mann, Esq.; and H. Reilly Semper, Esq.

LINCOLN'S INN.—A. Claribeux Curlewes, Esq.; Alexander Carter, Esq.; G. F. Dondeswell, Esq.; G. Willis Penfon, Esq.; W. Rose Holden, Esq.; Thomas Cope, jun.; H. Meredyth Plowden, Esq.; J. Douglas Walker, Esq.; J. Alexander Cruikshank, Esq.; T. Douglas Murray, Esq.; H. Richard Tomkinson, Esq.; T. Durell Hodge, Esq.; William Whitworth, jun. Esq.; W. George Lemon, Esq.; Edmund J. Towneley, Esq.; Frederic Thompson, Esq.; D. Roland Poppy, Esq.; Sefton W. Strickland, Esq.; Henry Godefroi, Esq.; D. Linto Alexander, Esq.; R. Stanley Scholefield, Esq.; Henry Rowland Brown, Esq.; Edward Haggard, Esq.; Theodore C. Hope, Esq.; C. Braine Finlayson, Esq.; J. George Laing, Esq.; Cave Stephen, Esq.; Monomohan Ghose, Esq.; and Judah P. Benjamin, Esq.

GRAY'S INN.—Sidney L. Blanchard, Esq.; and J. Southgate Ford, Esq.

The Council of Legal Education have awarded the following exhibitions to the undermentioned students, of the value of 30 guineas each, to endure for two years.—Constitutional Law and Legal History, Mr. Douglas Kingsford, student of the Middle Temple. Jurisprudence, Civil and International Law, Mr. W. A. Hunter, student of the Middle Temple; Mr. Edward Ford, student of Lincoln's Inn. The Common Law, T. De Courcy Atkins, student of the Middle Temple. The Law of Real Property, &c., Mr. John Shortt, student of the Middle Temple.

The Council of Legal Education have also awarded the following exhibitions of 20 guineas each, to endure for two years, but to merge on the acquisition of a superior exhibition.—Equity, Mr. R. B. Finlay, student of the Middle Temple. Common Law, Mr. R. B. Finlay, student of the Middle Temple. The Law of Real Property, &c., Mr. T. C. E. Pæzold, student of the Middle Temple.

APPOINTMENTS.

THE Rt. Hon. Lord Chelmsford has been appointed Lord High Chancellor, in the place of Lord Cranworth, resigned.

The Queen has been pleased to confer on Sir Frederic Pollock, late Lord Chief Baron of the Exchequer, the dignity of Baronet.

Sir Fitzroy Kelly, Q.C., M.P., has been appointed Lord Chief Baron of the Exchequer, in the place of Sir Frederick Pollock, resigned.

Sir Hugh McCalmont Cairns, Q.C., M.P., has been appointed Her Majesty's Attorney-General, in the place of Sir Roundell Palmer, resigned.

Mr. William Bovill, Q.C., M.P., has been appointed Solicitor-General, in the place of Sir R. P. Collier, resigned.

The Rt. Hon. J. R. Mowbray, M.P., has been appointed Judge Advocate-General, in place of the Rt. Hon. T. E. Headlam, Q.C., resigned.

Mr. Horatio Waddington, late Under Secretary of State for the Home Department, has been sworn in a Member of the Privy Council.

Mr. Thomas Erskine May, C.B., Assistant Clerk to the House of Commons, has been appointed a Knight Commander of the Civil Division of the Order of the Bath.

The following gentlemen have been appointed Queen's Counsel: Mr. James Dickinson, of Lincoln's Inn; Mr. Robert Scarr Sowler, of the Middle Temple; Mr. Samuel Prentice, of the Middle Temple; Mr. Thomas Jones, of the Middle Temple; Mr. Charles E. Pollock, of the Inner Temple; Mr. William Adam Mundell, of the Middle Temple; Mr. Richard Garth, of Lincoln's Inn; Sir George Essex Honyman, Bart., of the Middle Temple; and Mr. John Richard Quain, of the Middle Temple.

Mr. D. D. Keane, Q.C., has been appointed Recorder of Bedford, in the place of Mr. Stephenson, resigned; and Mr. Richard Roope, of the Western Circuit, Recorder of Tiverton, in the place of Mr. John Tyrrell, resigned.

Mr. Charles Beaven has been appointed Examiner of the High Court of Chancery, in the room of Mr. Kenyon Parker, Q.C., deceased.

Mr. C. J. Preston, of the Northern Circuit, has been appointed Stipendiary Magistrate for Birkenhead.

Mr. John Greenwood, Q.C., Assistant Solicitor to the Treasury, has been appointed Solicitor to the Treasury, in the room of Mr. H. R. Reynolds, deceased. Mr. A. R. Stephenson, Recorder of Bedford, has been appointed Assistant Solicitor.

The following gentlemen have been appointed Commissioners to inquire into corrupt practices at the recent election—

LANCASTER.—Alexander Staveley Hill, Esq.; Thomas Jewin Barstow, Esq.; and Robert Milnes Newton, Esq.

GREAT YARMOUTH.—Wyndham Slade, Esq.; Lucius Henry Fitzgerald, Esq.; and George Russell, Esq.

REIGATE.—Thomas Allen, Esq.; Frederick James Smith, Esq.; and Michael William O'Brien, Esq., Serjeant-at-Law. Albert de Rutzen, Esq., Secretary.

TOTNESS.—Montague Bere, Esq.; Francis Davy Longe, Esq.; and Charles Edward Coleridge, Esq. C. S. Bowen, Esq., Secretary.

Mr. Frederic Prideaux has been appointed, by the Society of Gray's Inn, Reader to the Inns of Court on the Law of Real Property, &c.

Mr. J. Robert Mellor and Mr. R. E. Francillon, of Trinity Hall, have received the new Degree of Master of Law in the University of Cambridge.

Mr. Charles J. Plumptre, Barrister-at-Law, has been appointed lecturer on public reading and speaking at King's College Evening Classes.

Mr. G. D. Engleart, of Lincoln's Inn, has been appointed Treasurer to their Royal Highnesses Prince and Princess Christian of Schleswig Holstein.

Mr. Walter Overbury, Solicitor, of Norwich, has been appointed a Deputy Registrar of the Archdeaconry of Norwich.

The Council of the Incorporated Law Society have re-elected Mr. R. Horton Smith to deliver a course of lectures on Conveyancing; and Mr. Ebenezer Charles a course on Equity; and have elected Mr. Henry W. Lord as lecturer on Common and Mercantile Law for the ensuing year.

IRELAND.—The Rt. Hon. Francis Blackburne, Lord Justice of Appeal has been appointed Lord Chancellor, in the room of the Rt. Hon. Mazier Brady, resigned; and the Rt. Hon. Joseph Napier, has been appointed Lord Justice of Appeal, in the place of Mr. Blackburne.

The Rt. Hon. James Whiteside, M.P., has been appointed Lord Chief Justice of the Court of Queen's Bench, in the place of the Rt. Hon. Thomas Lefroy, resigned.

Mr. J. E. Walsh, Q.C., has been appointed the new Solicitor-General; and Mr. R. Longfield, Q.C., Law-Adviser at the Castle.

Mr. S. E. Anderson has been appointed Marshal to the Admiralty Court, Dublin, vacant by the death of Mr. C. Taylor:

Mr. J. Calvert Stronge, senior Divisional Magistrate of Dublin, has been appointed Solicitor to the Inland Revenue in the room of Sir George Smyly, Q.C., deceased; and Mr. C. J. O'Donnel, Magistrate, vacated by Mr. Stronge.

SCOTLAND.—Mr. George Patton has been appointed Lord-Advocate and Mr. E. T. Gordon, Solicitor-General for Scotland; Mr. John Tait, Sheriff of Perth, in the place of Mr. Gordon; and Mr. George Munro, Sheriff of Linlithgow, etc., vacated by Mr. Tait.

Mr. John Marshall, junior, has been appointed Counsel to the Treasury; Mr. Charles Scott, Counsel for the Officers of State; Mr. W. Ellis Gloag, Counsel for the Admiralty; and Mr. David B. Hope, Counsel for the Ordnance House.

ISLE OF MAN.—Mr. James Gell has been appointed Attorney-General in the Isle of Man, in the room of Mr. Richard Ogden, deceased.

ISLE OF JERSEY.—Mr. R. P. Marrett has been appointed Procurator-General, in the place of Mr. J. W. Dupré, deceased, and Mr. George H. Horman, Advocate-General, vacant by the appointment of Mr. Marrett.

AFRICA.—Mr. J. Denysen and Mr. J. C. Fitzpatrick have been appointed puisne Judges of the Supreme Court of the Cape of Good Hope; and Mr. Simeon Jacobs, Solicitor-General.

INDIA.—Sir Benson Maxwell, Recorder of Penang, has been appointed Recorder of Singapore; Mr. William Hackett, Chief Justice of the Gold Coast, Recorder of Penang; Mr. R. B. Barton, Barrister-at-Law of Grays' Inn, Clerk and Sealer of the Insolvent Debtor's Court at Bombay; Mr. J. O'Leary, Clerk of the Crown, in the High Court of Judicature, during the absence of Mr. Marriott; Mr. R. A. Dallas, solicitor, to be Fellow of the University of Bombay; Mr. Rothery, formerly Judge at the Mixed Communion Court at Boa Vista, to be Assistant Justice and Judge of Common Pleas in the Bahamas; Mr. S. Wauchope, C.B., to officiate as Additional Sessions Judge of Balasore, Bengal; Mr. B. H. Powell, Assistant Commissioner of Lahore, to officiate as Judge of the Small Cause Court, Lahore; and Mr. A. R. Scoble to act as Remembrancer of Legal Affairs, during the absence on leave of Mr. J. S. White.

Necrology. ---

March.

6th. SAUNDERS, H. B., Esq., Government Advocate at British Birmah.

April.

- 17th. BERRY, HENRY, Esq., Solicitor, aged 67.
- 23rd. HARGREAVE, C. J., Esq., LL.D., F.R.S., late a Judge of the Incumbered Estates Court, Ireland, aged 46.
- 26th. BOOTH, HARRY, Esq., Solicitor, aged 49.
- 28th. CRAVEN, C. D., Esq., Barrister-at-Law, aged 37.

May.

- 1st. HUSSEY, H., Esq., late Registrar in the Court of Chancery.
- 6th. DAY, THOMAS, Esq., Solicitor, aged 56.
- 7th. BOWER, T. HOLME, Esq., Solicitor, aged 74.
- 8th. SMYLY, J. GEORGE, Esq., Q.C., D.L., Solicitor of Inland Revenue, aged 69.
- 12th. MATTHEWS, WILKINSON, Esq., Q.C.
- 13th. COURTHORPE, WILLIAM, Esq., Barrister-at-Law, Somerset Herald, and Registrar of the College of Arms, aged 58.
- 15th. PEEL, LAURENCE, Esq., Solicitor, aged 65.
- 15th. VAUGHAN, EVAN, Esq., Solicitor, aged 52.
- 20th. LAWRENCE, E. E., Esq., Solicitor, aged 82.
- 28th. CHAMBERLAIN, WILLIAM, Esq., Solicitor, aged 28.
- 28th. ELLIS, W. J., Esq., Barrister-at-Law, aged 85.
- 29th. POOLE, C. P., Esq., Solicitor.
- 30th. EACHWOOD, T. S. B., Esq., Barrister-at-Law, aged 45.

June.

- 3rd. PARKER, KENYON S., Esq., Q.C., aged 77.

- 6th. BELDAM, JOSEPH, Esq., Barrister-at-Law, aged 70.
12th. BENDLE, ROBERT, Esq., Solicitor, aged 74.
14th. ROBERTS, R. J., Esq., Solicitor.
23rd. REYNOLDS, H. R., Esq., Solicitor to the Treasury.

July.

- 3rd. SHUTTLEWORTH, WILLIAM, Esq., late Town Clerk of Liverpool, aged 58.
4th. TAYLOR, H. CAREW, Esq., Solicitor, aged 44.
21st. BURBEARY, J. PASHLEY, Esq., Solicitor, aged 44.
BULLER, Sir ANTHONY, Knt., late a Judge of the Supreme Courts of Madras and Bengal, aged 86.
21st. BURTON, JOSEPH, Esq., Solicitor, aged 63.

Revd. J. H. H.

